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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 11

GEORGE W. McCANDLESS, AS RECEIVER OF DUQUESNE GAS CORPORATION, PETITIONER,

vs.

MAXIME H. FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 28, 1934

CERTIORARI GRANTED APRIL 30, 1934

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

GEORGE W. MCCANDLESS, as Receiver of Duquesne Gas Corporation, Complainant-Appellee-Appellant,

against

MAXIME H. FURLAUD and KINGSTON CORPORATION, Defendants-Appellants-Appellees, and Byron Corporation and Chaucer Corporation, Defendants-Appellees, and Carlos Reuter, Defendant

(Cross Appeals)

STATEMENT UNDER RULE XIII

This action was commenced by the service of a subpœna and bill of complaint on all of the above-named defendants with the exception of the defendant Carlos Reuter on March 24th, 1932.

Carlos Reuter was not served nor did he appear in the above action.

An amended bill of complaint was served and filed on or about the 3rd day of May, 1932.

[fol. 2] The defendants herein moved under equity Rule 20 to compel the complainant to make a further and better statement of the nature of the claim set forth in the amended bill of complaint.

An order was entered on or about the 23rd day of June, 1932 denying the application made on behalf of the defendants under equity Rule 20. The said order was signed by the Hon. Francis G. Caffey, one of the Justices of the United States District Court for the Southern District of New York.

On or about the 5th day of July, 1932, the above-named defendants except Reuter filed their respective answers to the amended bill of complaint herein.

The complainant is George W. McCandless, as Receiver of the Duquesne Gas Corporation.

Ehrich, Royall, Wheeler & Walter are the solicitors for the complainant.

The defendants are Maxime H. Furlaud, Kingston Corporation, Byron Corporation, Chaucer Corporation.

Eppstein & Hirshfield are the solicitors for the said defendants.

There has been no change of parties or attorneys since the commencement of this action.

The trial commenced before the Hon. John C. Knox, District Court Judge sitting in the United States District Court for the Southern District of New York on the 9th day of November, 1932.

A decree was made on the 11th day of May, 1933 and entered on the 12th day of May, 1933 in the sum of $1,834,-640.08 together with costs and disbursements, in favor of the complainant and against the defendants, Maxime H. [fols. 3 & 4] Furlaud and Kingston Corporation and dismissing the bill of complaint as to the defendants Byron Corporation and Chaucer Corporation on the merits without costs.

The notice of appeal of the defendants, Kingston Corporation and Maxime H. Furlaud, together with assignment of errors, bond for costs and the citation were filed on the 19th day of July, 1933 and the appeal was allowed on the said day.

The bond for costs was approved on the 20th day of July, 1933.

The notice of appeal of the complainant, together with assignment of errors, bond for costs and the citation were filed on the 9th day of August, 1933, and the appeal was allowed on the 10th day of August, 1933.

The bond for costs was approved on the 10th day of August, 1933.

[fol. 5] In United States District Court, Southern District of New York

In Equity. No. 66-185

George W. McCandless, as Receiver of Duquesne Gas Corporation, Complainant,

against

Maxime H. Furlaud, Carlos Reuter, Kingston Corporation, Byron Corporation and Chaucer Corporation, Defendants

Amended Bill of Complaint

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The complainant, as Receiver of Duquesne Gas Corporation, brings this, his amended bill of complaint, and alleges:

First: That this is a suit of a civil nature wherein the amount in controversy exclusive of interests and costs is in excess of the sum of $3,000.

Second: That the complainant is a resident of the City of Pittsburgh, and a resident and citizen of the Commonwealth of Pennsylvania; that Duquesne Gas Corporation is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania having its principal office in the City of Washington, Commonwealth of Penn-
[fol. 6] sylvania, which lies within the territorial limits of the United States District Court for the Western District of Pennsylvania.

Third: Upon information and belief that defendants Maxime H. Furlaud and Carlos Reuter are residents of the County of New York and of the Southern District of New York; that defendant Kingston Corporation is a corporation organized under the laws of the State of New Jersey; that defendant Byron Corporation is a corporation organized under the laws of the State of Delaware; and that defendant Chaucer Corporation is a corporation organized under the laws of the State of Delaware.

Fourth: That by an order duly made in the United States District Court, in and for the Western District of Pennsyl-

vania, upon the 19th day of January, 1932, in a suit in equity, entitled "Frank T. Harrington, Plaintiff, against Duquesne Gas Corporation, Defendant", In Equity No. 2554, which suit was consolidated with a suit entitled "Central Hanover Bank and Trust Company, as Trustee under First Mortgage of Duquesne Gas Corporation, dated as of March 15, 1930, Plaintiff, against Duquesne Gas Corporation, Defendant", In Equity No. 2577, the complainant herein was appointed Receiver of all the assets and property, including choses in action, of said Duquesne Gas Corporation, and the complainant has duly qualified and is now acting as such Receiver; that upon petition of the complainant as such Receiver duly filed in the United States District Court, in and for the Southern District of New York, an order was duly made on the 23rd day of March, 1932, by said last mentioned Court appointing said com- [fol. 7] plainant, George W. McCandless, as Ancillary Receiver of Duquesne Gas Corporation, which last mentioned order duly authorized the complainant, as such Receiver, to bring this suit, and the complainant has duly qualified and is now acting as such Ancillary Receiver.

Fifth: Upon information and belief that on or about the 18th day of July, 1928, a corporation was organized under the laws of the State of New York named Furlaud & Company, Inc. the name of which was later changed to Furlaud, Reuter & Company, Incorporated and later changed to Winchelsea Holding Corporation, and a certificate of dissolution of which was filed on the 27th day of October, 1931; that defendants Maxime H. Furlaud, Carlos Reuter and/or their mere nominees or dummies were at all times the only stockholders of said corporation in this paragraph mentioned, and that they and/or their mere nominees or dummies were at all times the directors of said corporation, and that at the time of the filing as aforesaid of the certificate of dissolution of said corporation, said defendants Furlaud, Reuter and/or their mere nominees or dummies were all of the directors and stockholders of the corporation in this paragraph mentioned.

Sixth: Upon information and belief that the certificate of incorporation of said Duquesne Gas Corporation was filed in the office of the Secretary of the Commonwealth of Pennsylvania on the 13th day of February, 1930, and

since the completion of its organization shortly after that date has owned and operated natural gas wells, pipe lines and other property incidental thereto, all situated in the Western District of the State of Pennsylvania; the organi-
[fol. 8] zation of said Duquesne Gas Corporation was brought about by the defendants Maxime H. Furlaud and Carlos Reuter, and they acted as and were the promoters of such corporation. One Randolph C. Coleman, one McLane Tilton and one Frank A. Cabeen, Jr. were the original directors named in the certificate of incorporation and acted as such directors until the 7th day of April, 1930; said Coleman, Tilton and Cabeen were the mere nominees of defendants Furlaud and Reuter, and in all the acts which they performed as directors of said Duquesne Gas Corporation they acted merely at the behest of and under the instructions of said Furlaud and said Reuter. One Otto E. Schuller, one Thomas W. D. Duke, one Henry T. Wynn and one Charles C. Henderson, together with the defendants Furlaud and Reuter became directors of said Duquesne Gas Corporation on the 7th day of April, 1930, on which date said Coleman, Tilton and Cabeen resigned and ceased to act as directors. Said Schuller was an employee of defendants Furlaud and Reuter or of said corporation, sometimes known as Furland & Company, Inc. Said Duke was employed as an attorney at law by the defendants Furlaud and Reuter to draw the papers in carrying out the various proceedings herein alleged. They, as well as the said Wynn and Henderson, were the mere nominees of the defendants Furlaud and Reuter in acting as such directors and in all the steps taken by them as such directors they acted under the instructions and at the behest of said defendants Furlaud and Reuter.

Seventh: Upon information and belief that during or about the months of March and April 1930, defendants Furlaud and Reuter caused such steps to be taken by said Du-
[fol. 9] quesne Gas Corporation as to bring about the authorization of a first mortgage of $4,000,000 securing an issue of $4,000,000 of first mortgage bonds of Duquesne Gas Corporation, an indenture covering the issue of $1,000,000 of so-called Convertible 6½% Secured Gold Notes, and the issuance of 675,000 shares of no par value common stock.

Eighth: Upon information and belief that during or about the months of March and April 1930, the defendants Furlaud and Reuter acting through the above described corporation, then known as Furlaud & Company, Inc., made as the banking house of issue, a public offering of the $4,000,000 of said bonds at the offering price of 97½ and a public offering of the $1,000,000 of the said notes at 98, and through such banking house of said Furlaud & Company, Inc. stated in a bond circular publicly issued and advertised by them that, in the case of said bonds "These bonds were issued by the corporation in connection with the acquisition of properties and to provide cash for developments, extensions and other corporate purposes", and in the case of said notes that "These notes are issued by the corporation in connection with the acquisition of properties and to provide cash for developments, extensions and other corporate purposes"; that as a result of the steps so taken by the defendants Furlaud and Reuter at the time aforesaid, or shortly thereafter, the whole amount of said $4,000,000 of said bonds and of said $1,000,000 of said notes were issued and distributed to the public at said prices or at prices approximating the same, or at an aggregate purchase price for said bonds of approximately $3,900,000 and of said notes of $980,000, or at an aggregate sales price for both [fol. 10] said bonds and notes of approximately $4,800,000.

Ninth: Upon information and belief that at the time of the issuance, sale and distribution of said bonds and notes by the defendants Furlaud and Reuter, as aforesaid, said last mentioned defendants had made arrangements for the acquisition for said Duquesne Gas Corporation of various natural gas wells and properties situated in Southwestern Pennsylvania; that the aggregate price of said properties so arranged to be acquired for Duquesne Gas Corporation was $2,572,989; that during or about the month of April 1930, said gas properties were conveyed by the various owners thereof to said Duquesne Gas Corporation in consideration of the payment by Duquesne Gas Corporation of sums of money as the various purchase prices thereof aggregating the said sum of $2,572,989; that said sum of $2,572,989 was paid out of the proceeds of the sale of said bonds and notes.

Tenth: Upon information and belief that except for the payment as aforesaid for the benefit of said Duquesne Gas

Corporation of the said sum of $2,572,989 and except also for the payment into the treasury of said Duquesne Gas Corporation out of the proceeds of the sale of said bonds and notes of the sum of $365,000, and except for the payment out of the proceeds of the sale of such bonds and notes of such amount as may be considered a legitimate bankers' commission for the distribution and sale of said bonds and notes, and as may be considered proper organization expenses for the organization of Duquesne Gas Corporation, said Duquesne Gas Corporation received nothing [fol. 11] either directly or indirectly out of the approximately $4,880,000, which was the proceeds of the sale of said bonds and notes.

Eleventh: The the defendants Furlaud and Reuter caused all of the proceeds of the sale of said bonds and notes beyond the amount of said sum of $2,572,989 plus said sum of $365,000 (other than the legitimate bankers' commissions for the sale of said bonds and notes and legitimate expenses of organization of said corporation) to be diverted from the Duquesne Gas Corporation for whose use and benefit the proceeds of the sale of said bonds and notes was intended and defendants Furlaud and Reuter fraudulently misappropriated said moneys to their own use.

Twelfth: That defendants Furlaud and Reuter caused said Duquesne Gas Corporation to issue to them or to their nominees or dummies, including the defendants Kingston Corporation, Byron Corporation and Chaucer Corporation, 675,000 shares of the capital stock of said Duquesne Gas Corporation and sold 85,000 shares thereof in the name of defendants Byron Corporation and Chaucer Corporation for the sum of $850,000 cash, which sum of $850,000 was retained by the defendants Furlaud and Reuter and converted to their own uses through the agency of said last two mentioned defendant corporations.

Thirteenth: Upon information and belief that said Duquesne Gas Corporation has received out of the proceeds of the sale of said bonds and said notes, as well as out of the sale of said 85,000 shares of stock, or in consideration for the issuance of the balance of said 675,000 shares of stock, [fol. 12] nothing whatsoever except that, as aforesaid, it received the title to the gas properties purchased for it by de-

fendants Furlaud and Reuter at a cost of $2,575,989 and $365,000 of working capital and whatever benefits arose from the organization of the corporation and from the services of the defendants in selling its securities.

Fourteenth: Upon information and belief that defendants Furlaud and Reuter were the promoters of said Duquesne Gas Corporation; that they caused it to be organized; that all the steps which were taken for the consummation of its incorporation, organization, issuance of its said bonds, notes and stock were taken under the direction and at the behest of defendants Furlaud and Reuter; that they stand in a fiduciary relation to said Duquesne Gas Corporation; that defendants Furlaud and Reuter are accountable to the corporation for the proceeds derived from the issuance and sale by them as aforesaid of all of said securities of said corporation.

Fifteenth: Upon information and belief that the moneys diverted by defendants Furlaud and Reuter from the proper uses of said Duquesne Gas Corporation and misappropriated by defendants Furlaud and Reuter (even after the allowance of a fair and proper banking commission for the sale of said securities and after a fair and proper allowance for the expenses of the organization of Duquesne Gas Corporation) is not less than $2,500,000.

Sixteenth: Upon information and belief that the follow-
[fol. 13] ing were some of the additional steps taken by defendants Furlaud and Reuter in connection with the organization of said Duquesne Gas Corporation, the acquisition of its said gas properties and the issuance of its said securities and the diversion and misappropriation of its funds:

Defendants Furlaud and Reuter caused to be organized under the laws of the State of New Jersey the defendant Kingston Corporation, of which corporation they or their mere nominees or dummies were the only stockholders and of which they or their mere nominees or dummies were the only directors and officers; that defendants Furlaud and Reuter also caused to be organized under the laws of the State of Delaware the defendant Byron Corporation, that the stockholders of said Byron Corporation were defendants Furlaud and Reuter or mere nominees and dummies of Furlaud and Reuter, and the directors and officers of said

Byron Corporation were mere nominees or dummies of said Furlaud and Reuter; that defendants Furlaud and Reuter also caused to be organized under the laws of the State of Delaware the defendant Chaucer Corporation, that the stockholders of said Chaucer Corporation were defendants Furlaud and Reuter or mere nominees and dummies of Furlaud and Reuter, and the directors and officers of said Chaucer Corporation were mere nominees or dummies of said Furlaud and Reuter; that option agreements for the purchase of the various gas properties which were acquired as aforesaid for said Duquesne Gas Corporation were taken in the name of defendant Kingston Corporation, the sum total of which option prices was $2,572,989; that defendants Furlaud and Reuter also caused a contract to be made be- [fol. 14] tween said corporation, sometimes known as Furlaud & Company, Inc., and Duquesne Gas Corporation for the sale by Duquesne Gas Corporation to said Furlaud & Company, Inc. of $2,700,000 of said bonds and $1,000,000 of said notes, the contract price being 90 for said bonds and 88 for said notes, or an aggregate contract price of $3,310,000; that before the issuance and delivery of said bonds and notes which were sold as aforesaid, defendants Furlaud and Reuter arranged with the sellers of the several properties (the optioners) that such sellers or optioners should deposit in escrow in various banks situated in several towns in Western Pennsylvania convenient to the optioners, title papers conveying direct to Duquesne Gas Corporation said several gas properties under escrow agreements providing that upon drafts upon the Duquesne Gas Corporation for the respective purchase prices being taken up and paid, said title papers should be definitively delivered; that the date for definitive deliveries and the payment of the respective purchase prices was adjourned from time to time to correspond with the date for the delivery to various investment houses under the bankers syndicate for the sale of said bonds and notes and the receipt of the purchase price of said securities; that on the 7th day of April, 1930, delivery was made of a large part of said bonds and all of said notes and on that day drafts were taken up and paid out of the proceeds of the sale of said bonds and notes for the purchase price of said several gas properties; that the amount of the purchase price of said several gas properties was said sum of $2,572,989; that under date of April 7, 1930, a

written paper called "Agreement of Reorganization be-
[fol. 15] tween Duquesne Gas Corporation and Kingston Corporation of New Jersey" was signed, which bears the signatures of "Kingston Corporation by M. A. Furlaud, President, attested Robert Halporn, Assistant Secretary" and of "Duquesne Gas Corporation by Walter G. Krog, Vice-President, by Robert Halporn, Assistant Secretary"; that said Krog and Halporn were both employees of defendants Furlaud and Reuter or of said corporation hereinabove described, sometimes known as Furlaud & Company, Inc.; that under said so-called agreement of reorganization for an alleged consideration of the transfer by defendant Kingston Corporation to said Duquesne Gas Corporation of said gas properties, said Duquesne Gas Corporation agreed to pay $3,015,000 stated to be the amount which defendant Kingston Corporation would be obligated to pay at the Central Hanover Bank and Trust Company and by which said Duquesne Gas Corporation also agreed to issue and deliver to said Kingston Corporation 535,000 shares of its common stock and $1,300,000 in principal amount of its 6% Mortgage Convertible Gold Bonds; that soon thereafter defendant Kingston Corporation went through the form of granting options to various employees or dummy corporations of defendants Furlaud and Reuter or of said corporation, sometimes called Furlaud & Company, Inc., for the purchase at 50c a share of 510,000 shares of said capital stock of said Duquesne Gas Corporation, which so-called options were then caused by defendants Furlaud and Reuter to be assigned to the extent of 255,000 shares each to defendants Byron Corporation and Chaucer Corporation; immediately or soon after the 7th day of April, 1930, defendants Furlaud and Reuter caused defendant Kingston [fol. 16] Corporation to go through the form of declaring a dividend in kind to its stockholders of said $1,300,000 in face amount of bonds of Duquense Gas Corporation and 25,000 shares of the capital stock of Duquesne Gas Corporation; that defendants Furlaud and Reuter caused the original 1,000 shares of the capital stock of said Duquense Gas Corporation to be subscribed for by three individuals who are mere nominees or dummies of defendants Furlaud and Reuter, which subscriptions were assigned to said corporation sometimes known as Furlaud & Company, Inc., and defendants Furlaud and Reuter caused a subscription

for 139,000 additional shares to be made by said Furlaud & Company, Inc., and accepted by Duquesne Gas Corporation at 50c a share, or a total of 140,000 shares; that thereafter defendants Furlaud and Reuter acting through defendants Byron Corporation and Chaucer Corporation sold 85,000 of said last mentioned shares at $10 a share to one J. J. Bergen for the total sum of $850,000 in cash and as an incident thereto caused said shares of stock to be listed on the New York curb market; that the purchase price of $850,000 for said 85,000 shares of stock was received to the extent of $425,000 thereof by defendant Byron Corporation and to the extent of $425,000 thereof by defendant Chaucer Corporation; that thereafter defendants Furlaud and Reuter organized what is known as the Secondary Syndicate for the sale of $1,300,000 in face amount of the bonds of Duquesne Gas Corporation which were received by them as above stated through the mechanism of said Kingston Corporation; that said additionl bonds were to be sold by the distributing group of security dealers organized by the defendants to public investors at the price then (August 1930) [fol. 17] prevailing on the New York Curb for such bonds which was about 86; that all of said additional $1,300,000 of bonds were sold at about that time and about that price less a commission to dealers varying from two to four points according to the amount of bonds placed by such dealers and that defendants Furlaud and Reuter either directly or through said corporation, sometimes known as Furlaud & Company, Inc. received from the proceeds of the sale thereof the sum of approximately $1,100,000.

Seventeenth: That the complainant, as Receiver, is entitled on behalf of Duquesne Gas Corporation to have the defendants account to the corporation for the funds or moneys coming into their hands or into the hands of any of them or their agents or representatives from the sale of the securities of said Duquesne Gas Corporation or of any of said securities, and for the disposition made of such funds or moneys and to make restitution for any or all of such funds or moneys wrongfully diverted from Duquesne Gas Corporation and misappropriated or converted by the defendants or any of them to their own uses and for any or all secret or excessive profits taken or retained by them or any of them; that your complainant has no adequate

remedy at law and your complainant's rights may only be properly adjudicated in this Court of Equity.

Wherefore, your complainant prays as follows:

I. That the defendants Maxime H. Furlaud, Carlos Reuter, Kingston Corporation, Byron Corporation and Chaucer Corporation, and each of them, be compelled and required to account to said Duquesne Gas Corporation and [fols. 18-44] to complainant as Receiver of said Duquesne Gas Corporation for all funds or moneys coming into the hands of them or any of them or of the agents or representatives of any of them or in the hands of any one else acting with or for them from the sale of the bonds, notes and shares of stock of said Duquesne Gas Corporation.

II. That the Court shall decree the payment by the defendants and each of them to the complainant as Receiver of Duquesne Gas Corporation of such sum or sums of money as said Duquesne Gas Corporation or your complainant as its Receiver shall appear upon such account to be entitled.

III. The complainant prays for such other and further relief as to the Court appears to be just.

IV. That process of subpœna issue herein in due course directed to the defendants herein and each of them.

Ehrich, Royall, Wheeler & Walter, Solicitors for the Complainant. Office & P. O. Address: 20 Exchange Place, Borough of Manhattan, New York City. Ralph Royall and Clark Miller and William A. Magee, of Pittsburgh, of Counsel.

(Verified on April 27, 1932, by George W. McCandless.)

[fol. 45] In United States District Court, Southern District of New York

In Equity. No. 66-185.

[Title omitted]

Answer of Kingston Corporation

Kingston Corporation, for answer to the amended bill of complaint herein:

1. Admits the allegations of Paragraph "First" of the amended bill of complaint.

2. Denies any knowledge or information sufficient to form a belief as to whether complainant is a resident of the City of Pittsburgh and a resident and citizen of the Commonwealth of Pennsylvania, and admits the other allegations of paragraph "Second" of the amended bill of complaint.

3. With respect to the allegation of paragraph "Fourth" of the amended bill of complaint, defendant denies having information sufficient to form a belief with respect thereto and leaves the complainant to his proof thereof.

[fol. 46] 4. With respect to paragraph "Fifth" of the amended bill of complaint, defendant denies each and every allegation thereof except that it admits that on or about the 18th day of July, 1928, a corporation was organized and existed under the laws of the State of New York named "Furlaud & Company, Inc.", the name of which was later changed to "Furlaud, Reuter & Co., Incorporated" and later changed to "Winchelsea Holding Corporation", a certificate of dissolution of which was filed on the 27th day of October, 1931.

5. With respect to paragraph "Sixth" of the amended bill of complaint, defendant denies each and every allegation thereof except that it admits that Duquesne Gas Corporation was duly incorporated under the laws of the State of Pennsylvania and that it owned and operated natural gas wells and admits that Winchelsea Holding Corporation, then known as Furlaud & Company, Inc. caused the organization of Duquesne Gas Corporation; that Randolph C. Coleman, McLane Tilton and Frank A. Cabeen, Jr., acted for and on behalf of Winchelsea Holding Corporation, then known as Furlaud & Company, Inc.; and that Otto E. Schuller, Thomas W. Duke, Henry T. Wynn and Charles C. Henderson were all employed by or acted on behalf of Winchelsea Holding Corporation then known as Furlaud & Company, Inc.

6. With reference to paragraph "Seventh" of the amended bill of complaint, defendant denies each and every allegation thereof but admits that Winchelsea Holding Corporation, then known as Furlaud & Company, Inc., caused Duquesne Gas Corporation to authorize a first mortgage

of Four million dollars ($4,000,000) securing an issue of [fol. 47] Four million dollars ($4,000,000) of first mortgage bonds of Duquesne Gas Corporation, and caused an indenture of One million dollars ($1,000,000) to be issued covering the issue of One million dollars ($1,000,000) of Convertible 6½% Secured Gold Notes, and caused the issuance of Six hundred and seventy-five thousand (675,000) shares of no par value Common Stock of Duquesne Gas Corporation.

7. With respect to paragraph "Eighth" of the amended bill of complaint, defendant denies each and every allegation contained therein but admits that Winchelsea Holding Corporation, then known as Furlaud & Company, Inc., purchased from Duquesne Gas Corporation and others, certain bonds and notes of Duquesne Gas Corporation and resold some of the said bonds and notes to others.

8. With respect to paragraph "Ninth" of the amended bill of complaint, defendant denies each and every allegation contained therein.

9. With respect to paragraph "Tenth" of the amended bill of complaint, defendant denies each and every allegation and alleges that all of the bonds, notes and stock of Duquesne Gas Corporation were issued in consideration of the payment to Duquesne Gas Corporation of sundry sums of money and/or the transfer to it of properties or other things of value of the fair, reasonable and/or appraised value of the amount of the bonds and/or notes issued and that immediately after the issuance of the said bonds, notes and stock Winchelsea Holding Corporation and/or defendants Furlaud, Reuter, Kingston Corporation, Byron Corporation and/or Chaucer Corporation and/or the nominees [fol. 48] of them or of one or more of them were the holders of all of the issued and outstanding stock of the said Duquesne Gas Corporation.

10. With respect to paragraph "Eleventh" of the amended bill of complaint, defendant denies each and every allegation thereof and alleges that each and every sale of a bond or note of Duquesne Gas Corporation as alleged in the amended bill of complaint was made for the account of the Seller thereof who was the owner thereof and not for the account of Duquesne Gas Corporation.

11. With respect to paragraph "Twelfth" of the amended bill of complaint, defendant denies each and every allegation thereof and alleges that each and every share of stock issued by the Duquesne Gas Corporation was properly issued by the said Duquesne Gas Corporation for a good and valuable consideration, and resold by the person, firm or corporation (or the nominee of the said person, firm or corporation) to whom the stock was originally issued, for the account of that person, firm or corporation and not for the account of Duquesne Gas Corporation.

12. With respect to paragraph "Thirteenth" of the amended bill of complaint, defendant denies each and every allegation thereof.

13. With respect to paragraph "Fourteenth" of the amended bill of complaint, defendant denies each and every allegation thereof.

14. With respect to paragraph "Fifteenth" of the amended bill of complaint defendant denies each and every allegation thereof.

[fol. 49] 15. With respect to paragraph "Sixteenth" of the amended bill of complaint, defendant denies each and every allegation thereof except that defendant admits that Winchelsea Holding Corporation, then known as Furlaud & Company, Inc., organized and was (through its nominees) the sole stockholders of Kingston Corporation, that Winchelsea Holding Corporation then known as Furlaud & Company, Inc., purchased from Duquesne Gas Corporation, Two million seven hundred thousand dollars ($2,700,000) of bonds and One million dollars ($1,000,000) of notes at a price of 90 for the bonds and 88 for said notes, and further admits that under date of April 7, 1930 a written paper called "Agreement of Reorganization between Duquesne Gas Corporation and Kingston Corporation of New Jersey" was duly signed and executed, and further admits that Krogg and Halporn were employees of Winchelsea Holding Corporation, then known as Furlaud & Company, Inc., and further admits that Kingston Corporation declared a dividend in kind to its stockholders of One Million three hundred thousand dollars ($1,300,000) in face amount of bonds of Duquesne Gas Corporation and Twenty-five thousand (25,000) shares of the capital stock of Duquesne Gas Cor-

poration and further admits that Winchelsea Holding Corporation, then known as Furlaud & Company, Inc., subscribed and paid for One hundred and forty thousand (140,000) shares of stock of Duquesne Gas Corporation and paid therefor at the rate of fifty cents (50c.) per share, and further admits that the said Winchelsea Holding Corporation, then known as Furlaud & Company, Inc., sold the major part of the One million three hundred thousand dollars [fol. 50] ($1,300,000) in face amount of bonds which were received by it from Kingston Corporation.

16. With respect to paragraph "Seventeenth" of the amended bill of complaint, defendant denies each and every allegation thereof.

The defendant, without waiving any of the foregoing defenses and further answering said amended bill of complaint, alleges:

17. Upon information and belief, that the original subscribers to the capital stock of Duquesne Gas Corporation and each and every other person (or the person, persons, firm, firms, corporation or corporations for whom it or they were acting) who, from the inception of Duquesne Gas Corporation until on or about May 15, 1930, was either a stockholder of the said company or a subscriber for stock of said company or in any way otherwise interested in the stock of the company then issued or thereafter to be issued, had full knowledge of the corporate transactions referred to in the amended bill of complaint and of all matters affecting the same and with such knowledge approved the corporate transactions referred to in the amended bill of complaint and from time to time re-elected the directors who had authorized the same and ratified and affirmed said transaction by their acquiescence thereto and that at a meeting of the stockholders of Duquesne Gas Corporation duly held on April 8, 1930, at which all of the issued and outstanding stock of the corporation was present in person or by proxy, all of the acts set forth in the amended bill of [fols. 51-182] complaint were, by unanimous vote, ratified and confirmed and that the defendants, Furlaud, Reuter, Kingston Corporation, Chaucer Corporation and/or Byron Corporation and/or Winchelsea Holding Corporation and/or their nominees owned and/or controlled, at all pertinent times mentioned in the amended bill of complaint all

of the issued, outstanding and/or subscribed stock of Duquesne Gas Corporation.

Wherefore defendant prays that the amended bill of complaint be dismissed and it have such other and further relief as to the Court appears to be just.

Eppstein & Hirshfield, Solicitors for Kingston Corporation, Office & P. O. Address: 521 Fifth Avenue, Borough of Manhattan, City of New York.

(Verified on June 22, 1932, by Maxime H. Furlaud as President of Kingston Corporation.)

(Similar answers were interposed by defendants Maxime H. Furlaud, Byron Corporation and Chaucer Corporation.)

[fol. 183] PLAINTIFF'S EXHIBIT 1

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

FRANK T. HARRINGTON, Complainant,

against

DUQUESNE GAS CORPORATION, Defendant

PETITION OF GEORGE W. MCCANDLESS

To the Honorable Judges of the United States District Court for the Southern District of New York:

The petition of George W. McCandless, Receiver, shows to this Honorable Court:

First: That on the 19th day of January, 1932, your petitioner by a per curiam decree duly made by the United States District Court for the Western District of Pennsylvania, was duly appointed receiver of the assets, lands, tenements and hereditaments of the defendant, the Duquesne Gas Corporation, and all of its property, real and personal, including choses in action, and was required to file a bond in the penal sum of Fifty thousand dollars ($50,000).

Second: That your petitioner has duly accepted the trust in him reposed and has duly filed a bond as directed by said decree.

Third: That defendant is a corporation organized under and existing by virtue of the laws of the State of Penn- [fol. 184] sylvania, with its principal office in the City of Washington, Washington County, Pennsylvania, and that its principal business is the business of producing and selling natural gas.

Fourth: That the aforesaid decree appointing your petitioner as receiver, was granted upon the amended bill of complaint in the above-entitled action, duly filed in the United States District Court for the Western District of Pennsylvania, upon the answer of the defendant Duquesne Gas Corporation to said amended bill of complaint. Attached hereto and made a part hereof are exemplified copies of said amended bill of complaint, said answer and the decree appointing your petitioner receiver in said suit in the United States District Court for the Western District of Pennsylvania.

Fifth: That by the aforesaid decree the above entitled action was consolidated with an action brought in the District Court of the United States for the Western District of Pennsylvania by the Central Hanover Bank and Trust Company, as trustee under the first mortgage of the Duquesne Gas Corporation against said Duquesne Gas Corporation, and said decree appointed your petitioner as receiver in the consolidated action and that at all times subsequent to his qualification your petitioner has acted as receiver in the consolidated action.

Sixth: That the solicitors for said Frank T. Harrington, said Duquesne Gas Corporation and said Central Hanover Bank and Trust Company, as trustee, consented to the entry of said decree.

[fol. 185] Seventh: That on the basis of investigations conducted by your petitioner, your petitioner believes that the Duquesne Gas Corporation has a good cause of action against the promoters of defendant Duquesne Gas Corporation including Maxime H. Furlaud and Carlos Reuter for an accounting and for the restitution of funds fraudulently diverted and misappropriated and of secret and excessive

profits. Your petitioner as such receiver has retained the firm of Ehrich, Royall, Wheeler & Walter of the City of New York to take such proceedings as are necessary and proper for the purposes of bringing such suit in this district.

Eighth: That your petitioner is informed that said Maxime H. Furlaud and Carlos Reuter are residents of the County of New York which lies within the territorial limits of the District Court of the United States for the Southern District of New York.

Ninth: That your petitioner verily believes that it is necessary for the protection of the interests of the creditors and stockholders of said Duquesne Gas Corporation and for the interest of the corporation itself, that an ancillary receiver be appointed by this court for the purpose of instituting such action in this district.

Tenth: That no previous application for the relief herein sought has been made.

Wherefore, your petitioner prays for a decree of this court appointing an ancillary receiver of Duquesne Gas Corporation in and for the Southern District of New York [fol. 186] with all rights and powers to carry into force and effect the decree of the court of original jurisdiction, and to bring an action against said promoters for an accounting and for the restitution of funds fraudulently diverted and misappropriated and of secret and excessive profits, and to petition for an order to retain solicitors for that purpose, and to do any and all things necessary in connection therewith for the protection of the interests of the estate; and restraining the defendant, its agents, servants, attorneys, creditors and stockholders, and all persons from interfering in any manner with said ancillary receiver in effecting such purposes.

Dated New York, March 23, 1932.

George W. McCandless, Petitioner.

(Verified by George W. McCandless on March 23, 1932.)

[fol. 187] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

FRANK T. HARRINGTON, Complainant,

against

DUQUESNE GAS CORPORATION, Defendant

AFFIDAVIT OF GEORGE W. McCANDLESS

STATE OF NEW YORK,
County of New York, ss:

George W. McCandless, being duly sworn, deposes and says: I am the petitioner in the annexed petition; to the best of my knowledge there are no suits now pending against the defendant corporation for the appointment of a receiver save as set forth in said petition and save that an application has been made for the appointment of an ancillary receiver in the United States District Court for the District of West Virginia but that said application has not been prosecuted as it was discovered that your deponent's supposition that the defendant corporation owned property in West Virginia was erroneous.

George W. McCandless.

Sworn to before me this 23rd day of March, 1932.
Hazel E. Applegate, Notary Public.

[fol. 188] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 2554. In Equity.

FRANK T. HARRINGTON, Complainant,

against

DUQUESNE GAS CORPORATION, Defendant

AMENDED BILL OF COMPLAINT, ANNEXED TO PETITION OF GEORGE W. McCANDLESS

To the Honorable the Judges of the District Court of the United States for the Western District of Pennsylvania:

The complainant for himself and all other stockholders, bondholders, noteholders and creditors of the defendant corporation, who, being interested in the subject matter of this suit should become parties complainant hereto and contribute to the expenses hereof, brings this, his amended bill of complaint:

1. The complainant re-affirms the allegations contained in the first paragraph of his bill of complaint as filed to the effect that this is a suit of a civil nature in equity wherein there is involved a controversy wholly between citizens of various states and wherein the matter and amount in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

[fol. 189] 2. The complainant re-affirms the allegations contained in the second paragraph of his bill of complaint to the effect that he is a resident and citizen of the City of New York, in the State of New York, and is the owner of 100 shares of non-assessable common stock without nominal or par value, of the defendant corporation. He further avers that although the stock has been but recently transferred into his name, he has been the actual owner of the same in the name of Henry B. H. Ripley since September 5, 1930.

3. The complainant further avers that the defendant is a public utility corporation organized under the laws of the State of Pennsylvania in the year 1930 and at the present time has its principal office in the City of Washington, Washington County, Pennsylvania.

4. The complainant avers upon information and belief that the stockholders, bondholders and noteholders of the defendant are very many in number and are citizens and residents of many states in the United States and for that reason it is impossible for the complainant to join them in this action and the complainant brings this action not only for his own benefit, but also for and on behalf of all other stockholders, bondholders and noteholders of the defendant and in order that their respective rights and equities may be preserved and protected.

5. That the said defendant corporation has an authorized capital stock of Five million (5,000,000) shares without nominal or par value and that it has issued up to the

[fol. 190] present time six hundred and ninety thousand (690,000) of said shares. It further avers that the said defendant corporation owns or operates, either directly or through its subsidiaries, natural gas properties in Pennsylvania and West Virginia.

6. The complainant is informed, believes and therefore avers that practically all of the defendant corporation's gross income since its incorporation has been derived from the transportation, distribution and sale of natural gas to public utility corporations and industrial enterprises, and through a subsidiary to domestic consumers, all in the vicinity of the City of Pittsburgh.

7. The complainant is informed, believes and therefore avers that the principal assets of the defendant corporation are the property owned or leased, managed and operated through it and its subsidiaries consisting of over one hundred and twenty-five (125) gas wells in approximately fourteen thousand (14,000) acres of gas properties within a radius of from seven (7) to forty-five (45) miles of the City of Pittsburgh, and that it further owns pipe, equipment, machinery, etc.

8. The liabilities of the said defendant corporation are as follows:

(a) Four million ($4,000,000) Dollars First (closed) Mortgage 6% Convertible Gold Bonds, dated March 15, 1930, and which bear interest at the rate of 6% per annum, payable March 15th and September 15th in every year, aggregating at the present time $3,965,000. and will mature March 15, 1945, for the payment of which the defendant [fol. 191] corporation is distinctly liable. That interest on the said bonds due September 15, 1931, is in default and has continued in default for a period of more than thirty days.

(b) One million ($1,000,000) Dollars Convertible 6½% Secured Notes, dated March 15, 1930, maturing March 15, 1935, aggregating at the present time $949,000. for the payment of which the defendant corporation is directly liable. That interest on the said notes due September 15, 1931, is in default and has continued in default for a period of more than thirty days thereafter.

9. That in addition to its inability to provide sufficient reserve with which to meet the above mentioned interest on the first mortgage bonds, the corporation has carried on its business at a loss throughout the year 1930 and 1931.

10. The complainant is informed, believes and therefore avers that the company will continue to operate at a loss even without meeting its interests payments on account of bonds and notes, unless a complete reorganization of its business and affairs is accomplished.

11. The complainant is informed, believes and therefore avers that the defendant will not have sufficient funds to enable its business to be properly continued unless a receiver or receivers be appointed who can borrow the necessary funds subject to the approval of this Court, or in some other manner reorganize the said corporation. That such action is especially necessary in view of the fact that certain [fol. 192] contracts which the defendant has entered into can be realized upon at a profit only if the business, as a whole, can be carried on without interruption; and that unless this Honorable Court in view of the present inability of the defendant to meet its due and maturing obligations, will deal with the properties of the defendant as a whole as a trust fund for the payment of its creditors and stockholders and bondholders as their several interests therein shall appear, such properties will be dissipated, wasted and sacrificed, and interminable litigation will ensue to the great irreparable damage and injury of the complainant and the creditors and other stockholders, bondholders and noteholders of the defendant.

12. The complainant is informed, believes and therefore avers as follows:

Furlaud Reuter & Company, investment bankers of New York City, arranged the acquisition of the properties now owned or leased by defendant, Duquesne Gas Corporation and did acquire the same at a total cost of $2,527,250. Other expenses were incurred such as engineering, auditing, attorney fees, commissions, etc., amounting to $487,750 and working capital of $365,000 was provided, making total actual costs in connection with the acquisition of the properties of approximately $3,380,000. Title to the properties

was taken in Kingston Corporation, a corporation organized by and under the laws of the Commonwealth of Pennsylvania on May 28, 1930 with a directorate identical in personnel to that of defendant upon its organization, both of which corporations were owned and controlled at that [fol. 193] time by said Furlaud Reuter & Company. The properties were at once transferred to Duquesne Gas Corporation, defendant, at a profit to said Kingston Corporation of approximately $1,500,000.

13. The complainant is informed, believes and therefore avers as follows:

That said Furlaud Reuter & Company originally employed one Ralph E. Davis, a well known civil engineer, to appraise the various properties to be acquired for the defendant. Pursuant to said employment the said Davis appraised a portion thereof at $1,743,520 and upon his indication that his appraisal of the balance of the properties would be less than $1,000,000, a representative of said Furlaud Reuter & Company took the data upon which he was working to their offices in New York. Thereupon, and without notice to said Davis, the said Furlaud Reuter & Company employed the firm of Mattison, Davey & Winters to complete the appraisements, and that firm fixed the figure of $4,929,787 as the appraised value of the said balance of said properties. The complainant is informed, believes and therefore avers that at the present time, with gas reserves, the properties are worth in the aggregate approximately $3,200,000.

14. The complainant is informed, believes and therefore avers as follows:

The said 6% Convertible Gold Bonds in the amount of $4,000,000 at par was sold by the said Furlaud Reuter & Company, and/or their nominees, to the public at $975 each or $3,900,000 and of said sum the defendant corporation [fol. 194] received the benefit of but $900. each or $3,600,000., the balance being retained by said Furlaud Reuter & Company and/or their nominees.

15. The complainant is informed, believes and therefore avers as follows:

That the said 6½% Gold Notes in amount $1,000,000 at par, were sold by the said Furlaud Reuter & Company

and/or their nominees to the public at $980 each or $980,000 and of said sum the defendant corporation received the benefit of but $880 each or $880,000, the balance being retained by said Furlaud Reuter & Company and/or their nominees.

16. The complainant is informed, believes and therefore avers as follows:

That in the capitalization of the defendant, Duquesne Gas Corporation, the said Furlaud Reuter & Company caused the total amount of stock, actually issued at that time, to-wit, 675,000 shares to be issued to them or their nominees at the stated price in the capital structure of the said defendant of 50c. per share, or a total of $387,500, some of which said stock was sold by them or their said nominees at various prices up to $9.00 per share, as a result of which said Furlaud Reuter & Company and/or their nominees acquired a net profit in excess of $800,000, none of which said profit was accounted for or was of benefit to the said defendant, Duquesne Gas Corporation.

17. The complainant is informed, believes and therefore avers that aside from the Bondholders' Protective Commit-
[fol. 195] tee, of which he is a member, and which has filed a petition to intervene in these proceedings, another so-called Bondholders' Protective Committee under the influence of the said Furlaud Reuter & Company and/or their nominees and associates has attempted to suppress the facts surrounding the fraudulent incorporation and capitalization of the defendant by compelling the trustee of the said First Mortgage Bonds to bring foreclosure proceedings against the defendant corporation without allowing any opportunity whatsoever for a possible reorganization of the business and affairs of the defendant, and your complainant is informed, believes and therefore avers that in the proceeding to foreclose, petitions to intervene have been or will be filed by the Bondholders' Protective Committee of which he is a member, and which has revoked the authority given to the trustee in the said mortgage indenture, and likewise by certain other noteholders and stockholders of the defendant.

18. The complainant is informed, believes and therefore avers that proceedings have been instituted in a State Court

of the State of New York in the City of New York, in which alone can jurisdiction be obtained, against the said Furlaud Reuter & Company, is officers, directors, associates and counsel for restitution of all monies and property improperly converted by them from the credit of said Duquesne Gas Corporation, in which said suit was restitution all stockholders, bondholders, noteholders and creditors of said Duquesne Gas Corporation are or should be interested.

[fol. 196] 19. The complainant further avers that the Bondholders' Protective Committee of which he is a member was on November 24, 1931 permitted by the Public Service Commission of the Commonwealth of Pennsylvania to intervene in proceedings instituted by said Commission against the defendant, Duquesne Gas Corporation, to determine its status as a public utility and to determine whether it has been properly organized, incorporated and financed, and that the said Bondholders' Protective Committee is cooperating with the said Public Service Commission of Pennsylvania in its effort to work out a solution of the affairs of the defendant corporation or to reorganize its business and enable it to continue.

20. The complainant has no adequate remedy at law and only through the intervention of this Honorable Court through the appointment of a receiver or receivers for the defendant corporation can full relief be granted, or the rights of your complainant and other stockholders, bondholders, noteholders and creditors be protected.

Wherefore, the complainant being without adequate remedy at law, and in need of the protection of a Court of Equity in securing his rights respectfully prays as follows:

1. That this Honorable Court appoint forthwith a receiver or receivers of all and singular the property of the defendant corporation, of whatsoever nature, with full power to take into his or their possession, hold and manage the same under the direction of this Court, with such [fol. 197] powers as this Court may from time to time grant in its discretion, to bring suit for, collect, receive and take into his or their possession all the property and assets of the defendant corporation, including its books, records, vouchers, checks, moneys, real estate and all other property, real, personal and mixed; to institute, prosecute, be-

come parties to, intervene, compromise or defend any actions at law, or in equity or in any statute for the recovery, protection and maintenance of any of the assets or properties of the defendant corporation, as he or they may deem proper or necessary, including the institution and prosecution of any such ancillary proceedings as he or they may deem advisable; to settle, collect, compound, adjust or make allowances upon any debts that may be due or owing to the defendant corporation as he or they may deem proper; to pay any such claims or wages as may have priority, and in general, with all the usual powers of receivers in such cases.

2. That the officers, managers, employees, creditors, stockholders, bondholders and noteholders of the defendant corporation and all other persons, firms and corporations be forthwith required to transfer, convey and deliver up to such receiver or receivers possession of all property of the defendant corporation wheresoever situated.

3. That all persons, firms and corporations be enjoined forthwith from instituting, commencing, prosecuting or continuing the prosecution of any actions, suits, or proceedings at law or in equity or under any statute against defendant corporation, from levying or serving any attach-
[fol. 198] ments or executions or other processes upon the defendant corporation save and except the filing of mechanics' or other stautory liens and generally that all persons, firms and corporations be enjoined from doing any act to interfere with said receivers in their possession of the property of the defendant corporation.

4. That your complainant may have such other and further relief as may be just or proper.

Patterson, Sherrard & Miller, Solicitors for Complainant.

(Verified by Frank T. Harrington, December 31, 1931.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 2554. In Equity

FRANK T. HARRINGTON, Complainant,

vs.

DUQUESNE GAS CORPORATION, Defendant

AMENDMENT TO PRAYER, ANNEXED TO PETITION OF GEORGE W. McCANDLESS

The complainant for himself and all other stockholders, bondholders, noteholders and creditors of the defendant corporation hereby amends the prayer of his amended bill of complaint so that it shall read as follows:

[fol. 199] 1. That the rights of the complainant and all other stockholders, bondholders, noteholders and creditors of the defendant corporation may be ascertained, decreed and determined; that this Honorable Court will fully administer the fund in which the complainant and all other stockholders, bondholders, noteholders and creditors are interested constituting all the property and assets of the defendant in accordance with the rights, equities, liens and priorities, if any, existing thereon and will enforce and decree the rights, equities, liens and priorities of the creditors, bondholders, noteholders and stockholders of the defendant as the same may finally be ascertained and decreed by this Court.

2. That this Honorable Court appoint forthwith a receiver or receivers of all and singular the property of the defendant corporation, of whatsoever nature, with full power to take into his or their possession, hold and manage the same under the direction of this Court, with such powers as this Court may from time to time grant in its discretion, to bring suit for, collect, receive and take into his or their possession all the property and assets of defendant corporation, including its books, records, vouchers, checks, moneys, real estate and all other property, real, personal and mixed; to institute, prosecute, become parties to, intervene in, compromise or defend any actions at law or in equity, or under any statute for the recovery, protection

and maintenance of any of the assets or properties of defendant corporation, as he or they may deem proper or necessary, including the institution and prosecution of any such ancillary proceedings as he or they deem advisable; to [fol. 200] settle, compound, adjust or make allowances upon any debts that may be due or owing to the defendant corporation as he or they may deem proper; to pay any such claims or wages as may have priority, and in general, with all the usual powers of receivers in such cases.

3. That the officers, managers, employees, creditors, stockholders, bondholders, and noteholders of the defendant corporation, and all other persons, firms and corporations be forthwith required to transfer, convey and deliver up to such receiver or receivers possession of all property of the defendant corporation wheresoever situated.

4. That all persons, firms and corporations be enjoined forthwith from instituting, commencing, prosecuting or continuing the prosecution of any actions, suits or proceedings at law or in equity, or under any statute, against defendant corporation, from levying or serving any attachments or executions or other processes upon the defendant corporation save and except the filing of mechanics' or other statutory liens, and generally that all persons, firms and corporations be enjoined from doing any act to interfere with said receivers in their possession of the property of the defendant corporation.

5. That your complainant may have such other and further relief as may be just or proper.

Patterson, Sherrard & Miller, Solicitors for Complainant.

Certified from the records this 22nd day of March, 1932,
J. Wood Clark, Clerk.

[fol. 201] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 2554. In Equity

FRANK T. HARRINGTON, Complainant,

vs.

DUQUESNE GAS CORPORATION, Defendant

DEFENDANT'S ANSWER TO AMENDED BILL OF COMPLAINT, ANNEXED TO PETITION OF GEORGE W. McCANDLESS

Duquesne Gas Corporation, the defendant, answers as follows the averments of the amended bill of complaint:

1. Defendant admits the averments of paragraph 1.

2. Defendant admits that complainant is the owner of 100 shares of defendant's common stock without nominal or par value. Defendant avers that complainant became the holder of record of said shares on the 21st day of September, 1931 except for the complainant's own averment that defendant has no knowledge, information, or source of information as to the date when complainant became the actual as distinguished from the record owner of said shares.

3. Answering the averments of paragraph 3, defendant denies that it was organized under any statute of Penn- [fol. 202] sylvania especially applicable to public utility corporations, and avers that it was organized and now exists under and by virtue of the General Corporation Act of 1874, its amendments and supplements. Defendant avers that its business is the sale of gas to large industrial and public utility consumers under special contracts in each case, and that it does not itself sell any gas to domestic consumers. Defendant admits that Victor Gas Company, a subsidiary of the defendant, sells gas to domestic consumers, but avers that the domestic consumers to whom said Victor Gas Company sells gas do not exceed and never have exceeded the number of six. Said Victor Gas Company is a public utility corporation under the laws of Pennsylvania and is subject to regulation and control as such by the Public Service Commission of Pennsylvania. Defendant avers that a proceeding is

now in progress before said Public Service Commission at Docket No. 8879 for the purpose, inter alia, of ascertaining and determining whether or not the defendant is a public utility corporation. The defendant neither admits nor denies that it is a public utility corporation, but submits the complainant's averment in that behalf to adjudication by this Court.

4. Defendant admits the averments of paragraph 4.

5. Defendant admits the averments of paragraph 5 except that defendant denies that it owns natural gas properties in West Virginia, directly or indirectly. Defendant avers that its natural gas properties in West Virginia, [fol. 203] whether held directly or indirectly through subsidiaries, are not owned in fee, but are held under lease.

6. Defendant admits the averments of paragraph 6, the said admission as to domestic consumers, however, being qualified by the averments of paragraph 3 hereof.

7. Defendant admits the averments of paragraph 7.

8. (a) Defendant admits the issuance of $4,000,000 par value of First Mortgage 6% Convertible Gold Bonds of the description alleged by complainant, that $3,965,000 thereof are outstanding, and that the interest due thereon September 15, 1931, under the terms thereof has not been paid. Defendant denies that the said bonds will mature September 15, 1945, and avers that the same are now due under the terms thereof by virtue of acceleration of maturity due to declaration of default. Defendant neither admits nor denies that it is liable on the said bonds but leaves that issue to an adjudication, hereby referring to defendant's answer in a suit in this Court entitled "Central Hanover Bank & Trust Company, as trustee under First Mortgage of Duquesne Gas Corporation dated March 15, 1930, Plaintiff, against Duquesne Gas Corporation, Defendant, No. 2577, In Equity". A copy of said answer is hereto annexed, marked Exhibit 1 and made part hereof.

(b) Defendant admits that there are now issued and outstanding $949,000 par value of Convertible 6½% Secured [fol. 204] Gold Notes of the description alleged by complainant. Defendant neither admits nor denies that it is liable thereon, but leaves that issue for adjudication by this

Court, hereby averring that the defendant's incorporation and right to do business were not submitted to or approved by the Public Service Commission of Pennsylvania, that no certificate of notification was filed with said body on the issuance of said notes, and that no action was had or taken by said commission in that behalf; and the defendant hereby refers to the averments of said Exhibit 1 in respect of the proceeding before said Commission now pending at its Docket No. 8879. Defendant admits that the interest due September 15, 1931 under the terms of said notes has not been paid.

9. Defendant admits the averments of paragraph 9.

10. Defendant denies that it is or has been doing business at a loss even without paying or providing for the interest on said bonds and notes, and avers that it is and has been doing business at a loss if the said interest be charged but at a profit if said interest be not charged; and defendant avers on information and belief that if no charge or deduction were to be made for said interest, defendant's operations would be at a profit. Defendant admits that, said interest being charged or deducted, it cannot continue to operate otherwise than at a loss unless there be a complete reorganization of the defendant in respect of its capital structure.

11. Answering paragraph 11, defendant denies that it is unable to continue to carry on its business without the ap- [fol. 205] pointment of a receiver who can borrow funds for that purpose, and avers that the defendant now has sufficient cash resources to carry on its business and pay its current expenses. Defendant admits, however, that it cannot without greater working capital than it now has, continue to operate its business and pay, in addition to current expenses, interest upon the above mentioned bonds and notes. Defendant further admits that it cannot permanently carry on its business without reorganization and substantial changes in its capital structure. Defendant denies the complainant's averment that the defendant is presently unable to meet its due and maturing obligations, and avers that it is able to meet such obligations except the said bonds and notes and interest thereon. Defendant denies that there are any pending suits or attachments by creditors whereby the defendant's properties will be dissipated, wasted and

sacrificed, but admits that a suit has been commenced in this Court at No. 2577 in Equity, as aforesaid, for the principal purpose of foreclosure on said $3,965,000, face amount of First Mortgage 6% Convertible Gold Bonds. Defendant further admits that the rights, liens, priorities and securities of the holders of the defendant's said outstanding bonds, notes and stocks should be ascertained, determined, adjudicated and declared by this Court. Defendant further admits that in the opinion of the defendant this cannot be done, or the rights of all parties in interest be fairly and justly determined, or a reorganization of the defendant be effected without the interposition of this Court and the appointment of a general receiver of all the defendant's [fol. 206] properties and franchises.

12-16. Answering the averments of 12-16, both inclusive, defendant admits that said Ralph E. Davis appraised a portion of the properties now held by the defendant and that said Mattison, Davey & Winters appraised a portion thereof and that the appraisal by said Davis showed a value of the property appraised by him of $1,743,520. As to complainant's averment that the appraisal of the remainder of the properties by Mattison, Davey & Winters showed a valuation of $4,929,787, defendant avers that the aggregate of the two appraisements was $6,929,501, but that the total valuation used by the defendant's board of directors in connection with the issuance of securities was $6,673,307. Defendant did not itself employ either said Ralph E. Davis or said Mattison, Davey & Winters, and does not know what may have passed between Furlaud Reuter & Company and said Ralph E. Davis as to the figure at which said Ralph E. Davis would have appraised the portion of defendant's properties subsequently appraised by Mattison, Davey & Winters, and does not know whether said last mentioned firm did or did not give notice to said Davis or consult with said Davis before making its appraisal. Defendant denies on information and belief that the present value of the properties now held by defendant is $3,200,000, and avers on information and belief that the present value of said properties does not exceed approximately $2,200,000. Defendant does not know and is not informed at what figure

[fol. 207] or figures said Furlaud, Reuter & Company or any other person, may have disposed of the defendant's securities to the public.

17. Answering the averments of paragraph 17, defendant admits that a suit has been commenced as hereinbefore stated for the foreclosure of the above mentioned First Mortgage Bonds, and, on information and belief, that suit was brought at the instance of a Bondholders' Protective Committee other than that of which complainant is a member; but defendant avers that it is without knowledge as to the other matters alleged by complainant in said paragraph.

18. Defendant has no knowledge or information as to whether the suit described by the complainant in paragraph 18 is under contemplation or by whom as plaintiffs, or any knowledge or information in regard to any such suit other than the complainant's averments in that behalf. Otherwise, the defendant is unable to answer the averments of paragraph 18.

19. Defendant admits that said Bondholders' Protective Committee has been permitted to intervene in said proceeding now pending before the Public Service Commission of Pennsylvania. As to whether said Bondholders' Protective Committee is co-operating with said Commission or to what extent, the defendant has no knowledge or information.

20. Defendant admits the averments of paragraph 20.

[fol. 208] And for further answer, defendant avers:

21. Reference is made to said suit of foreclosure at No. 2577 in Equity, and particularly to this defendant's answer therein, being Exhibit 1 hereto attached, from which it appears that a substantial question is raised as to the validity of said $3,965,000 of First Mortgage Bonds now outstanding, and particularly as to the validity of $1,300,000 thereof. In case said First Mortgage Bonds, or any portion thereof, shall be held invalid and securities heretofore issued by the defendant subsequent in lien or security to said First Mortgage Bonds held valid, said First Mortgage Bonds or such invalid portion thereof, either would not be paid

or would be subsequent in lien and security to other securities of the defendant by their terms subsequent in lien and security to said First Mortgage Bonds. So that there is inherent in the present situation a conflict, or potential conflict, in interest, between the holders or some of the holders, of the First Mortgage Bonds and the holders of securities by their terms subsequent thereto.

22. The complainant herein avers that he is a stockholder, but in paragraph 17 of said amended bill of complaint he avers further that he is a member of a Bondholder's Protective Committee. Defendant avers on information and belief that the said committee is a committee formed in the interest of the holders of First Mortgage Bonds and that the primary interest of the complainant herein is in respect of the First Mortgage Bonds. Defendant further avers on information and belief that the complainant and the said committee of which he is a member [fol. 209] are acting in association and co-operation with divers investment banking and brokerage houses by which the defendant's First Mortgage Bonds were marketed, although certain of said houses may have marketed, in addition to said First Mortgage Bonds, other securities of the defendant.

23. In said amended bill of complaint, particularly in paragraph- 13 to 16 thereof, it is charged that Furlaud Reuter & Company, an investment banking house, has committed fraud upon defendant in connection with certain of the defendant's securities and is bound to make restitution.

24. Defendant avers on information and belief that said foreclosure suit at No. 2577 in Equity has been brought pursuant to demand made upon the trustee by a Bondholders' Protective Committee for holders of First Mortgage Bonds other than the Bondholders' Protective Committee of which the complainant is a member, and that said committee consists of persons connected with investment banking houses by which defendant's First Mortgage Bonds were marketed.

25. In view of the facts averred in paragraphs 22, 23 and 24 hereof, it appears that both complainants now seeking the appointment of a receiver for the defendant, to-wit,

Central Hanover Bank & Trust Company as trustee at No. 2577 in Equity and the complainant in this suit, and the persons at whose instance the said complainants are acting in seeking the appointment of a receiver, are primarily interested in establishing the validity, priority, and lien of the defendant's First Mortgage Bonds as distinguished from any other class or classes of defendant's securities, [fol. 210] whereas, as defendant submits, the ultimate solution of the defendant's present difficulties must be worked out through a general receivership, a full and impartial investigation of all the circumstances under which the defendant's securities were issued and distributed to the public, and an adjudication of the rights, liens, and priorities of all classes of security holders and creditors.

Wherefore, the defendant prays:

1. That the rights of all creditors of the defendant and of the holders of the defendant's First Mortgage Bonds, secured notes, and stock may be ascertained, decreed, and determined; that this Court will fully administer the fund in which the defendant's creditors and holders of the defendant's securities are interested, constituting all the property and assets of the defendant, in accordance with the rights, equities, liens and priorities of the creditors and stockholders of the defendant as the same finally may be ascertained and decreed by this Court.

2. That this Court, for the purpose of granting the relief prayed for herein and to protect the rights and interests of all the stockholders and creditors of the defendant, take over unto itself the jurisdiction and control of all the assets and property of the defendant of every kind and description whatsoever, and that, pending this suit, it grant such specific relief as from time to time may be expedient and appropriate to maintain such jurisdiction and control.

3. That for the purpose of preserving the unity and integrity of the property and assets of the defendant and of [fol. 211] preventing disruption thereof by any separate executions, attachments, or levies that may be attempted during the pendency of this suit, a receiver or receivers be appointed of the defendant and all of its property and assets, real, personal, and mixed, of whatsoever kind and description and wheresoever situate, and all the tolls, earn-

ings, rents, issues, profits, revenues, and income thereof, with the usual powers of general receivers and with full power and authority to take possession of the properties, real and personal, premises, easements, franchises, leases, rights, privileges, and interests of the defendant of whatsoever kind and character, and to manage and operate the same and to continue the business of the defendant and to collect and receive the tolls, earnings, issues, rents, profits, revenues, and income thereof, and every part thereof, and to apply the same as this Court from time to time may order and decree; and that such further powers and authority as to this Court may seem meet and proper may be granted by it to any receiver or receivers so appointed.

4. That the properties and assets and business of the defendant may be ordered to be sold as an entirety, with such exceptions and in such manner and upon such terms and conditions as this Court shall deem just and equitable, and that any such order shall make proper and suitable provisions for the protection of all just and lawful equities, rights, priorities, claims, and liens of the creditors of the defendant and shall provide for the sale of the property, assets, and business of the defendant, subject to or free and clear from any and all liens and incumbrances, and [fol. 212] that the proceeds of any such sale may be distributed by and under the direction of this Court among the creditors of the defendant adjudicated by the Court to have interests therein and such others, if any, as this Court may adjudicate to be entitled thereto.

5. That pending this suit an injunction may issue out of and under the seal of this Court enjoining and restraining all persons, including creditors of the defendant, from levying executions upon, attaching, or intermeddling with or taking possession of any of the property or assets of the defendant.

6. That the Court will make such other and further decrees and orders from time to time as may be just, meet and proper for the administration of the defendant's property and assets by the Court by its receiver or receivers and to ascertain, determine, adjudicate, protect and assure the rights of creditors of the defendant and any and all

other persons having any interest, legal or equitable, in or to the property and assets of the defendant.

Duquesne Gas Corporation, by Charles C. Nuss, President. Maynard Teall, Reed, Smith, Shaw & McClay, Solicitors for the Defendant. Hause, Evans & Baker, Harrisburg, Pennsylvania, of Counsel.

(Verified by Charles C. Nuss, President, Jan. 15, 1932.)

[fol. 213] CERTIFIED COPY OF RESOLUTION OF BOARD OF DIRECTORS OF DUQUESNE GAS CORPORATION, ANNEXED TO ANSWER IN HARRINGTON v. DUQUESNE GAS CORPORATION

Whereas, in the District Court of the United States for the Western District of Pennsylvania, at No. 2554 in Equity, Frank T. Harrington, as complainant, has filed suit against this corporation for a receiver and for relief as prayed for in his bill of complaint, an answer having been filed thereto by C. C. Nuss, President of the corporation; and

Whereas, on January 12, 1932 an amended bill of complaint was filed by the complainant in said cause, to which no answer on the part of this corporation has as yet been filed; and

Whereas in the said Court at No. 2577 in Equity, Central Hanover Bank & Trust Company, as trustee under the First Mortgage Indenture, has filed bill of complaint for foreclosure and other relief to which answer has been filed by this corporation through the agency of C. C. Nuss as President; and

Whereas in connection with said last mentioned proceeding, formal application has been made to the Court for the appointment of a receiver; and

Whereas the said suits and the status of the company with respect to its outstanding securities present a very complicated situation on which it is necessary for the President of the company to keep in close touch with counsel and [fol. 214] possibly to take such action as his judgment may commend without previous authorization of this board as to each specific action proposed to be taken by the corporation;

Resolved, that C. C. Nuss, the President of this corporation, be, and hereby is, authorized and empowered after

consultation with counsel, to take such action on behalf of this corporation as his judgment may commend in connection with either of the before mentioned suits or any other suits entered by or against this corporation arising in connection with its outstanding securities or any of the same or its obligations with respect thereto.

Resolved, further, that C. C. Nuss, the President of this corporation, be, and hereby is, authorized in his discretion, and on behalf of this corporation, to consent to the appointment of a receiver for this corporation in either of the above mentioned suits or any other suit; provided that the said C. C. Nuss shall first consult with counsel in regard thereto.

[fol. 215] State of Pennsylvania,
County of Alleghany, ss:

I, Harry J. Steele, Secretary of Duquesne Gas Corporation, hereby certify that the foregoing is a true and correct copy of preambles and resolutions adopted by the Board of Directors of this corporation at a meeting duly held on January 15, 1932.

Harry J. Steele, Secretary. (Corp. Seal.)

Sworn to and subscribed before me this 15th day of January, A. D. 1932. Fern F. Mesing, Notary Public. (Notarial Seal.)

Certified from the record this 22nd day of March, 1932.
J. Wood Clark, Clerk.

[fol. 216] Exhibit I, Annexed to Answer of Duquesne Gas Corporation

In the District Court of the United States for the Western District of Pennsylvania

In Equity. No. 2577

Central Hanover Bank & Trust Company, as Trustee under First Mortgage of Duquesne Gas Corporation dated March 15, 1930, Plaintiff,

against

Duquesne Gas Corporation, Defendant

Duquesne Gas Corporation, the defendant herein, admits the averments of the Bill of Complaint made in paragraphs

First to Fifteenth (both inclusive) thereof, except it does not admit (1) that it, the said defendant, is a corporation duly organized and existing under the laws of Pennsylvania, or (2) that all said $3,965,000.00 of First Mortgage Bonds now outstanding are in the hands of bona fide holders thereof for value, or (3) that all said $3,965,000.00 of bonds now outstanding, and particularly $1,300,000.00 par value thereof, are the lawfully issued, valid, and binding obligations of the defendant, or (4) that the said mortgage creates and establishes the first lien it purports to create and establish; but the defendant leaves the said not admitted mat-
[fol. 217] ters for determination and adjudication upon the facts hereinafter stated:

Sixteenth: The defendant corporation was organized and created under the Act of Assembly of the Commonwealth of Pennsylvania of April 29, 1874, P. L. 73, and its amendments and supplements, with charter powers as follows:

"Said corporation is formed for the purpose of mining, drilling, boring for and producing petroleum, oil, natural gas and other minerals and substances, incidentally developed, and the manufacturing, buying, selling, trading and dealing in the products and by-products thereof; the acquiring and holding of such lands, leases, mining and drilling rights, and the construction, erection and operation of such lines, pipe lines, buildings, machinery and appliances as may be necessary and convenient therefor and the transaction of all such business as is necessary and incidental thereto."

Seventeenth: At the time of organization and issuance of its securities, including the said First Mortgage Bonds, the defendant was advised by counsel that it was not a public service company or subject to the Public Service Company Law of Pennsylvania (Act of July 26, 1913, P. L. 1374); accordingly, the defendant did not seek or obtain the approval of said Public Service Commission to be incorporated, organized, or created, or to begin the exercise of any right, power, franchise or privilege and did not on or
[fol. 218] prior to the date it issued its securities, including said First Mortgage Bonds, file with said Commission its certificates of notification covering the issuance of said securities, or with respect to either of said matters, take any proceeding before said Commission.

Eighteenth: On April 28, 1931, the said Public Service Commission, purporting to act under said Public Service Company Law, issued its order at Complaint Docket No. 8879 against this defendant as follows:

"That an inquiry and investigation upon the Commission's own motion be and is hereby instituted into the status of the Duquesne Gas Corporation, and its failure to comply with the provisions of the laws of the Commonwealth applicable to public service companies; said inquiry to be scheduled for hearing and/or argument if desired not less than fifteen (15) days from the date of service hereof upon notice."

Said order was duly served upon the defendant, and a certified copy thereof is attached hereto, marked Exhibit "A", and made part hereof.

On September 1, 1931, said Commission, at the same docket number, issued a further order against defendant as follows:

"That the inquiry and investigation heretofore instituted by the Commission on its own motion under date of April 28, 1931, be and is hereby extended to include an inquiry [fol. 219] and investigation into the promotion, organization, financing and acquisition of the properties of the Duquesne Gas Corporation, and its failure to comply with the provisions of the laws of the Commonwealth applicable to public service companies."

Said further order was duly served on this defendant, and a certified copy thereof is hereto attached, marked Exhibit "B", and made part hereof.

On November 24, 1931, at the same docket number, a further order was made in said proceeding as follows:

"That S. P. Woodward, Frank T. Harrington, C. E. Wheeler and V. Blake Allison, constituting a Bondholders' Protective Committee of Duquesne Gas Corporation be and are hereby permitted to intervene in said complaint."

Said last mentioned order was duly served on this defendant, and the same is annexed hereto, marked Exhibit "C", and made part hereof.

Nineteenth: Said Commission has not as yet terminated said proceeding at its Docket No. 8879 or made any deter-

mination as to the sufficiency of this defendant's organization as a corporation or as to the validity of any of this defendant's outstanding securities or of the issuance thereof, but the said proceeding at Docket No. 8879 is still pending before said Commission and undetermined.

[fol. 220] The defendant avers the following facts in respect of, particularly, the above mentioned $1,300,000 par value of said First Mortgage Bonds:

Twentieth: The defendant corporation was organized on or about February 13, 1930 with authorized capital stock of 1,000 shares without nominal or par value having a stated capital of $500.00, which latter amount was paid in cash. On March 5, 1930, the defendant's organization meeting having been held February 21, 1930, the Board of Directors of the defendant authorized an increase of capital stock from 1,000 shares as aforesaid to 1,250,000 shares without nominal or par value having a stated capital of $625,000.00 and also authorized an increase of indebtedness from nothing to $10,000,000.00, and called a special meeting of stockholders for April 3, 1930, for the purpose, inter alia, of considering and acting upon the said increases of capital stock and indebtedness.

Twenty-first: Said meeting of stockholders was held on said appointed day, April 3, 1930, and said increases of capital stock and indebtedness were authorized and approved by the stockholders; the stockholders waived pre-emptive rights on the new stock so authorized; an amendment to the by-laws was approved providing that the stockholders should not have pre-emptive rights on new stock; the directors were authorized to issue stock up to 1,250,000 shares for such consideration as they should approve; the directors were authorized to accept an offer of Furlaud & Company, Inc., a New York corporation, to buy 139,000 shares of the just authorized stock for fifty cents per share, [fol. 221] or $69,500.00; engineers' and accountants' reports were submitted on the properties intended to be acquired by the company; the indenture under which said First Mortgage Bonds were issued was approved; a General Mortgage Indenture was approved under which $1,000,000.00 of General Mortgage 6½% Gold Bonds might be issued; and an agreement was approved under which Secured Gold Notes might be issued to the amount of $1,000,000.00 secured by $1,000,000.00 of said General Mortgage 6½% Gold Bonds.

Twenty-second: On April 7, 1930, a special meeting of the Board of Directors of the defendant corporation was held at which the following business was transacted: (1) Said offer of Furlaud & Company, Inc. to buy 139,000 shares of stock for $69,500.00 was accepted; (2) execution and delivery of the above mentioned indentures and agreement were authorized; (3) 400,000 shares of stock were set apart to meet the conversion requirements of the First Mortgage Bonds and Secured Notes; (4) a proposed agreement between Kingston Corporation (a New Jersey corporation) and the defendant was authorized and approved under which the defendant was to acquire its properties, the substance of said agreement being as follows:

(a) Kingston Corporation to transfer the said properties to the defendant corporation;

(b) The defendant corporation to pay the Kingston Corporation therefor by discharging $3,015,000.00 of indebted-
[fol. 222] ness owing by Kingston Corporation to Central Hanover Bank & Trust Company, the complainant herein, and by delivering to said Kingston Corporation $1,300,-000.00 par value of this defendant's First Mortgage Bonds and 535,000 shares of this defendant's stock:

(5) an offer of said Furlaud & Company, Inc. to buy $2,-700,000 par value of said First Mortgage Bonds at $900.00 and accrued interest per bond and $1,000,000.00 par value of said Secured Notes at $880.00 and accrued interest per note was accepted.

Twenty-third: Shortly after the said meeting the Kingston Corporation transferred said properties to the defendant corporation and the defendant corporation paid therefor as agreed; and said $2,700,000.00 of First Mortgage Bonds were delivered to Furlaud & Company, Inc. for $900.00 per Bond in cash and $1,000,000.00 of said Secured Notes were delivered to said Furlaud & Company, Inc. for $880.00 per note in cash, with accrued interest in each case.

Twenty-fourth: The defendant avers on information and belief that said Kingston Corporation was a subsidiary of said Furlaud & Company, Inc. and in said transaction was subject to the control of and in fact was controlled by said Furlaud & Company, Inc. Defendant further alleges, also upon information and belief, that the said properties trans-

ferred to the defendant corporation for, in effect, $3,015,000.00 in cash, $1,300,000.00 of First Mortgage Bonds, and [fol. 223] 535,000 shares of stock had cost the said Kingston Corporation, for the properties and all expenses in connection with the acquirement thereof, only $3,015,000.00.

Twenty-fifth: Defendant alleges on information and belief that at the time and times of all the directors' and stockholders' meetings hereinbefore referred to, said Furlaud & Company, Inc. owned all the stock of the defendant then outstanding except directors' qualifying shares, and the defendant's directors were the nominees of and were under the control of and in fact were controlled by said Furlaud & Company, Inc., and said Furlaud & Company, Inc. was the promoter of the defendant corporation and its organization and of the sale of the defendant's First Mortgage Bonds and other securities.

Twenty-sixth: On April 7, 1930, subsequent to the meeting of the Board of Directors of the defendant corporation above referred to and held on the same day, the then directors of the defendant corporation, three in number, resigned, and the number of the Board of Directors of the defendant was increased to six, and six new directors, and also a new President and a new treasurer, were elected.

Twenty-seventh: When the said transaction between the defendant corporation and Kingston Corporation was authorized and approved as above stated, the stockholders and directors of the defendant had before them reports of engineers of high standing showing the gas reserves and [fol. 224] plant and equipment to have a value of $6,923,501.00 based upon a certain program of development; but in said reports the gas reserves of non-operating properties held merely under lease were included in the valuation on a gas reserve basis, whereas, for the issuance of bonds thereon which was made subsequent to said reports, the said non-operating properties, as defendant alleges on information and belief, should have been placed on a value-of-acreage basis. The defendant avers on information and belief that on a value-of-acreage basis for non-operating properties held under lease the properties acquired by the defendant corporation from Kingston Corporation did not have a value in excess of $3,015,000.00, which was the

amount, or the approximate amount including expenses, paid therefor by said Kingston Corporation.

Twenty-eighth: In view of the facts hereinabove stated, the defendant does not know, and therefore leaves to judicial determination, whether said $1,300,000.00 of First Mortgage Bonds delivered to Kingston Corporation in connection with the acquirement of the defendant's properties did or did not constitute a fictitious issue of securities for which the issuer received no value.

Twenty-ninth: Defendant does not know who are the persons now holding said $1,300,000.00 of bonds delivered to said Kingston Corporation, or whether the holders thereof acquired the same for value or with or without notice of the matters hereinbefore averred, or whether said $1,300,000.00 of bonds are valid obligations of the defend-
[fol. 225] ant corporation or entitled to the lien and security of the said First Mortgage Indenture.

Duquesne Gas Corporation, by C. C. Nuss. President.
Maynard Teall, Reed, Smith, Shaw & McClay, Solicitors for Defendant. Hause, Evans & Baker, Harrisburg, Pennsylvania, of Counsel.

(Verified by C. C. Nuss on December 7, 1931.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 2554. In Equity

FRANK T. HARRINGTON, Plaintiff,

vs.

DUQUESNE GAS CORPORATION, Defendant

PER CURIAM DECREE, ANNEXED TO PETITION OF GEORGE W. McCANDLESS

And now, to-wit, January 19, 1932, the above cause came on for further hearing upon the bill of complaint as amended and the answer of the respondent as amended, [fol. 226] and it appearing to this Court that another action, brought by the Central Hanover Bank and Trust

Company as Trustee under the first mortgage of the Duquesne Gas Corporation dated as of March 15, 1930, against said Duquesne Gas Corporation at No. 2577 in Equity, seeks the foreclosure of the said first mortgage on the properties of the above named defendant, and that a complaint and answer have been filed therein, and the plaintiff in this action, No. 2554 in Equity, appearing by his solicitor, Clark Miller, Esq., and the defendant, by its solicitor, Maynard Teall, Esq., and the plaintiff in the proceeding at No. 2577 in Equity appearing by its counsel, Frank B. Ingersoll, Esq., and the defendant in said action by its counsel, Maynard Teall, Esq., and all of said counsel consenting to the entry of this order and the Court being fully advised of the premises, it is now

Ordered, adjudged and decreed:

1. That George W. McCandless, of the City of Pittsburgh, Pennsylvania, be and he is hereby appointed receiver of all and singular the assets, lands, tenements and hereditaments of the defendant, the Duquesne Gas Corporation, and all of its property, real, personal and mixed, of every nature and kind whatsoever, including all pipe lines, machinery, appliances, fittings and equipment belonging to or connected therewith, and all oil and gas rights, leases and leaseholds and the wells, derricks, drain pipes, casing, tubing, machinery and appliances and equipment thereon, connected therewith or belonging thereto, and all leases, contracts, stocks, bonds, obligations, choses in action, ac- [fol. 227] counts and rights owned by, belonging to or due to the defendant company, and all rights, franchises, income and profits granted to, acquired by or belonging to the defendant company.

2. That said receiver shall, before entering upon his duties hereunder, give and file with the Court a bond in the penal sum of $50,000 with surety or sureties approved by this Court, and conditioned that he will faithfully perform his duty as receiver herein and in any ancillary proceedings wherein he may be appointed, and will well and truly account for any and all moneys or property coming into his hands as such receiver, in accordance with the provisions of this order or any other order which may from time to time be issued by this Court, and abide by and perform all things which he is herein or may hereafter be directed to

perform in this cause or in any ancillary proceedings wherein he is appointed.

3. Upon the filing and approval of the said bond, said receiver be and he is hereby authorized, empowered and directed to take immediate possession of all and singular the assets above described or referred to, wherever the same may be situate or found, and until a further order of this Court to continue the operation of the business of the defendant company and every part or portion thereof and to run, manage and conduct such business under leases, contracts or arrangements as heretofore run, managed, conducted and operated by the defendant company, but the Court expressly reserves to itself the right to pass upon, disapprove, disavow and cancel any and all leases, arrangements and contracts of every nature, kind and description [fol. 228] under or by virtue of which the defendant company has been or is now operating any of its property.

The receiver shall exercise all such powers as are usually exercised by receivers and all such as are necessary, useful or convenient to the proper conduct by him of the business of the corporation, and he shall discharge all such duties as are within the line, scope and purpose of his appointment, including full power and authority to demand, sue for, collect, receive and take into possession the goods, chattels, rights, credits, moneys, effects, books and property of every description belonging to said defendant, Duquesne Gas Corporation, and including power to do any and all other acts which may be necessary to preserve the rights and properties of said defendant, Duquesne Gas Corporation. The receiver shall also exercise such further powers as the Court may from time to time grant.

4. That the defendant corporation and each and every of its officers, directors, agents and employees and all other persons, associations and corporations are now and hereby ordered, commanded and directed to turn over and deliver to such receiver, or his duly constituted representatives, any and all of the books of account, records, vouchers, checks, deeds, leases, contracts, agreements, notes, accounts, moneys, stocks, bonds, obligations and property of every kind and nature, real, personal and mixed, now in or which may hereafter come into his or their hands, control or possession.

That the defendant corporation and each and every of [fol. 229] its said officers, directors, agents and employees and all other persons, associations and corporations be and they are now and hereby restrained and enjoined during the pendency of this cause and the administration of the said receiver from transferring, selling, disposing of, or interfering with any of the property of the defendant corporation and from taking possession of or in any way interfering with the same or any part thereof, and from disturbing, preventing, or in any way interfering with the receiver in his possession, control, operation or management of the property, or any part thereof, of the defendant company over which the said receiver is hereby appointed as such; and from instituting, commencing, prosecuting or continuing the prosecution of, except as herein provided, any actions, suits or proceedings at law or in equity against the defendant corporation, from levying or serving any attachments or executions or other processes upon the defendant corporation save and except the filing of mechanics' or other statutory liens and save also as herein provided; and from disturbing, preventing or in any way interfering with the receiver in the discharge of his duties hereunder.

5. As soon as may be after the entry of this order, the receiver shall segregate and sequester for the benefit of the Trustee, plaintiff, at No. 2577 in Equity, and the holders of the first mortgage bonds of the defendant and appurtenant coupons secured by the first mortgage, all income, rents, issues and profits from the property, subject to the lien of the first mortgage, and apply the same to and for their benefit, subject only to such expenses and other uses as may be legally and properly incurred in the operation [fol. 230] and preservation of said property, having due regard to the rights of the said bondholders and the Trustee, plaintiff, at No. 2557 in Equity, and to the protection of the security of the first mortgage.

The receiver, as soon as practical and convenient, shall cause to be prepared a schedule of all and singular the property of the defendant, subject to the lien of the first mortgage, which may come into his possession as such receiver, and shall file the same with the Clerk of this Court, and he is directed to keep separate accounts of his transactions as such receiver and of such moneys and other property and assets which may from time to time come into

his hands as such receiver, and of the rents, issues, and profits of the property and assets, subject to the lien of the first mortgage, and to make report thereof from time to time as this Court may direct, but said schedule, account and/or reports shall not be conclusive on the Trustee, plaintiff, in the action at No. 2577 in Equity, it being further provided that said segregation and sequestration and separate accounting shall be without prejudice to any rights of the parties in said action at No. 2577 in Equity and shall not be taken as any adjudication of the rights of the first mortgage bondholders or any other class of security holders.

6. This action and that at No. 2577 in Equity, in which the Central Hanover Bank and Trust Company, as Trustee, is plaintiff, and the Duquesne Gas Corporation is defendant, be and the same are hereby consolidated and that action and all the proceedings therein shall hereafter be brought and docketed under the title, number and term of [fol. 231] this action, said consolidation being made without prejudice to the rights of the parties as accrued under the pleadings heretofore filed in said action at No. 2577 in Equity.

7. The Court reserves the full right and jurisdiction from time to time to make such further orders or decrees amplifying, extending, limiting or otherwise modifying this order as to it may at any time seem proper and in all respects and at all times to regulate and control the conduct of the receiver.

Per Curiam. S.

Certified from the record this 22nd day of March, 1932.
J. Wood Clark, Clerk.

DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF PENNSYLVANIA

No. 2554. In Equity

FRANK T. HARRINGTON, Complainant,

vs.

DUQUESNE GAS CORPORATION, Defendant

CERTIFICATE, ANNEXED TO PETITION OF GEORGE W. McCANDLESS

I, J. Wood Clark, Clerk of the United States District Court for the Western District of Pennsylvania do hereby [fol. 232] certify that bond in the sum of $50,000 filed by George W. McCandless, Receiver, was filed and approved by the Court on the 20th day of January, 1932.

Witness my hand and the seal of this Court this 22nd day of March, 1932.

J. Wood Clark, Clerk. (Seal of the United States District Court, Western District of Pennsylvania.)

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. 66-184

FRANK T. HARRINGTON, Complainant,

against

DUQUESNE GAS CORPORATION, Defendant

ORDER APPOINTING GEORGE W. McCANDLESS ANCILLARY RECEIVER

Upon the annexed bill of complaint filed in the above entitled suit in the United States District Court for the Western District of Pennsylvania, and upon the answer of the defendant therein to said amended bill of complaint, and upon the per curiam decree therein of the United [fol. 233] States District Court for the Western District of Pennsylvania, dated the 19th day of January, 1932, ap-

pointing George W. McCandless receiver of the assets, lands, tenements and hereditaments of the defendant Duquesne Gas Corporation, and all of its property real and personal, including choses in action, and upon the certificate of the Clerk of the United States District Court for the Western District of Pennsylvania of the filing and the approving of the bond of said receiver, and upon reading and filing the petition of said George W. McCandless, duly verified the 23 day of March, 1932 from which it appears to the satisfaction of the Court that there is need of an ancillary receivership in this district.

Now, on motion of Erich, Royall, Wheeler & Walter, solicitors for the petitioner, it is

Ordered, adjudged and decreed that George W. McCandless be and he hereby is appointed ancillary receiver of Duquesne Gas Corporation in and for the Southern District of New York to carry into force and effect the order of the Court of original jurisdiction, and it is further

Ordered, adjudged and decreed that said ancillary receiver is hereby authorized to bring an action against the promoters of said corporation, including Maxime H. Furlaud and Carlos Reuter, for an accounting and for the restition of funds fraudulently diverted and misappropriated and of secret and excessive profits; and to petition for an order to retain solicitors for that purpose; and to do any and all things necessary to be done in connection therewith; and it is further

[fols. 234-317] Ordered, adjudged and decreed that the defendant, its agents or employees, stockholders, creditors and all marshalls, sheriffs, constables and all other officers, and generally all persons, firms and corporations whatsoever, are hereby enjoined from interfering or attempting to interfere in any manner with said ancillary receiver in effecting such purposs, and it is further

Ordered, adjudged and decreed that before entering upon the performance of any of his duties the said ancillary receiver shall execute and file with the Clerk of this Court a bond with one or more sureties approved by this Court in the penal sum of Twenty-five thousand Dollars ($25,000) conditioned upon the faithful discharge of his duties, and that upon any moneys or funds coming into his hands said ancillary receiver shall immediately report the fact to the

Court and submit to the Court the question of an increase of this bond, and it is further

Ordered, adjudged and decreed that any corporate surety duly qualified in accordance with General Rule 28 of this Court shall be sufficient for this purpose, and it is further

Ordered, adjudged and decreed that said ancillary receiver shall make himself amenable to the jurisdiction of this Court and shall authorize his attorneys within this District to accept upon his behalf service of any process of the Federal and State Courts within this District and shall have leave to apply to this Court for further orders and authority and shall comply with all orders of the Court of original jurisdiction.

(Signed) Wm. Bondy, U. S. D. J.

March 23, 1932.

[fol. 318] In United States District Court

Opinion by Knox, D. J.

This is a suit in equity brought by complainant, as Receiver of Duquesne Gas Corporation, to compel defendants to account

"for all funds or moneys coming into the hands of them or any of them, or of the agents or representatives of any of them, or in the hands of anyone else acting with or for them, from the sale of the bonds, notes and shares of stock of said Duquesne Gas Corporation."

The special grievance of the bill is that defendants, or some of them, through the instrumentality of an alleged banking house, known as Furlaud & Co., Inc. came into possession of funds arising from the public offerings of securities of Duquesne Gas Corporation, in the relationship of fiduciaries to that company, and that a large portion of the funds so received, were diverted and misappropriated from the treasury of the gas corporation. The defendants named in the bill may be identified as follows:

Maxime H. Furlaud was the president and principal stockholder of Furlaud & Co. Inc. Carlos Reuter, also an officer and large stockholder in Furlaud & Co. Inc., although named as a defendant herein, was not served with

process. He is, therefore, out of the case. Kingston Corporation was a wholly owned subsidiary of Furlaud & Co. Inc. Byron Corporation was owned, in part, by the wife of Maxime H. Furlaud, and in part by the Kipling Corporation, the ownership of which was not revealed. Chaucer Corporation was owned partly by the wife of Carlos Reuter, and partly by Virgil Corporation, whose ownership likewise did not appear.

[fol. 319] The evidence discloses that Furlaud & Co. Inc., a New York Corporation, was engaged in the business of selling issues of corporate securities to the public. The series of events under inquiry had its beginning early in 1930 when Reuter went to Pittsburgh, and negotiated with the owners of nine different gas properties located in Western Pennsylvania, for the purchase of their holdings. He secured gratuitous options thereon, which were taken in the name of Kingston Corporation. Ralph E. Davis, an engineer familiar with the value of the properties, was engaged to make an appraisal of the same. Davis, together with a staff of assistants, entered upon the work. By February 1, 1930, he had rendered reports which indicated that five of the properties, including their working capital, had an aggregate value of around $1,700,000. They were subsequently acquired for about $1,300,000. At the time this appraisal was submitted, Davis had about completed his data relating to the four other tracts, and his preliminary figures, as laid before Reuter, showed their approximate value to be in the neighborhood of $1,000,000. At about this time, Reuter secured possession of Davis's working papers, and retained a Texas concern, by the name of Mattison, Davey & Winters, to complete the appraisal. A man named Conrad, who seems to have had no experience in the Pennsylvania gas fields, was delegated to do the work. After working single-handed for some ten days, Conrad fixed his valuation of the four remaining properties at about five million dollars. Certain of these gas lands which were later conveyed to Duquesne Gas Corporation for $660,000 by one Nuss, who had been born and raised in the field, and who was in the gas business, were valued by Conrad for [fol. 320] approximately $1,900,000. When Nuss made his conveyance, he included therein certain leases upon undeveloped lands which were regarded as a gift. Conrad gave these undeveloped properties a valuation of $850,000.

Other lands, known as the Behm properties, the Tucker acreage, and the Levier tract, which were acquired by the gas corporation for a total sum of $222,697, were valued at $1,300,000. From the recital, it will be observed that properties costing about $900,000, were appraised as being worth about $4,000,000. The total appraisal for all of the gas properties examined by Conrad was about $5,000,000 although their total cost was only around $1,200,000.

The valuation thus fixed having been reached near the middle of February, 1930, the bankers procured extensions of their options upon the lands and made payments to the several optioners, upon account of the purchase prices named in the agreements. The documents were enforcible at the election of the optionees.

About a week thereafter, and on February 21, 1930, Furlaud & Co. Inc. caused Duquesne Gas Corporation to be organized under the laws of the Commonwealth of Pennsylvania. This concern had an authorized capital of 1,000 shares of no par common stock. The stock was subscribed by nominees of Furlaud & Co. Inc. at fifty cents per share. The banking house then arranged with the several optioners of the gas properties for the execution of deeds of assignment thereon, and for the delivery of the latter and accompanying muniments of title in escrow, to various banks located in Pittsburgh and its vicinity.

Duquesne Gas Corporation was named as the assignee in the conveyances thus deposited. Under the terms of the [fol. 321] option agreements, the balance of the purchase price yet to be paid for the properties was $2,449,900, after taking into consideration various down payments which had previously been made by Kingston Corporation.

The next step in the plan under way was the action of Furlaud & Co. Inc. in bringing about the organization of a so-called "Banker's Syndicate," and a distributing group for the sale and distribution to the public of First Mortgage Six Percent Gold Bonds of Duquesne Gas Corporation, of the par value of four million dollars. The Syndicate was headed by Furlaud & Co., Inc. as managers; and included in its membership, were four other so-called banking houses. All were named in the public announcement of the bond issue which appeared in the New York Times of March 25, 1930. Some forty dealers in corporate securities, scattered over the length and breadth of the land, be-

came members of the distributing group. The bonds were offered at 97½ percent of par, and members of the distributing group were entitled to a commission of four percent of par.

At about the time this step was in progress, Duquesne Gas Corporation, the entire capital stock of which was held by Furland & Co. Inc. or its nominees, authorized issue of four million dollars of six percent gold bonds, and the one million dollars of 6½% percent notes, to be secured respectively by first and second mortgages upon its properties. The Company's authorized capital was also increased from 1,000 to 675,000 shares, without par value.

Circulars advertising the bonds now made their appearance. These instruments, as well as the announcement that appeared in the New York Times, proclaimed that the [fol. 322] bonds were secured by a mortgage covering properties which, including working capital of $365,000, had an aggregate appraised value of $7,038,000. It was also stated that the properties examined by Mattison, Davey and Winters, had been appraised at $4,929,787, while those examined by Ralph E. Davis, carried an appraisal of $1,743,520.

There was testimony at the trial that the circulars, as originally printed, combined the appraised values, and indicated that appraisal as having been jointly made by Davis and by Mattison, Davey and Winters. Upon the objection of Davis, this phraseology was changed so as to eliminate such a misrepresentation.

On April 7, 1930, Duquesne Gas Corporation and Kingston Corporation entered into what was termed an "Agreement of Reorganization". This instrument provided that Kingston Corporation would acquire the optioned gas properties then in escrow, and turn them over to Duquesne Gas Corporation. The latter, on its part, agreed to pay $3,015,000 to Central Hanover Bank & Trust Company, the amount which Kingston Corporation would be under obligation to pay to the Trust Company. The Duquesne Company further agreed to issue 535,000 shares of its stock and $1,300,000 face value of its first mortgage six percent gold bonds to Kingston Corporation, the bonds to be secured by an indenture, dated March 15, 1930, in which the Trust Company was named as Trustee. On April 9, 1930, the following transactions were had at the offices of Central Hanover Bank & Trust Company:

Maxime H. Furlaud arranged with the bank that for a period of one day the Kingston Corporation should have a credit of $3,015,000, and that Furlaud & Company, Inc. [fol. 323] for a like period of time, should be entitled to a credit of $3,379,500.

When these credits, which were both closely controlled by the Trust Company, had been set up, Kingston Corporation delivered its certified checks, in the aggregate amount of $2,449,900 to the Equitable Trust Company, Guaranty Trust Company of New York and Central Hanover Bank and Trust Company, respectively. These checks were intended to put the drawees in funds with which to meet drafts which had been drawn against them by the banks in Western Pennsylvania, which held in escrow the several instruments of conveyance by which the gas properties were to be transferred to Duquesne Gas Corporation.

The balance which now remained to the credit of Kingston Corporation upon the books of Central Hanover Bank and Trust Company—the sum of $565,100, was immediately paid back to Furlaud & Company, Inc.—$300,000 for alleged loans advanced and expenses incurred, and $265,100 in the form of a loan. This loan, it may be remarked, incidentally, has never been repaid.

The banking institutions which received the checks of Kingston Corporation having made telephonic and telegraphic reports of the payments of the purchase money drafts to the banks holding the escrowed conveyances, the latter were straightway delivered and recorded. This information, being received, Duquesne Gas Corporation proceeded to issue to Kingston Corporation the 535,000 shares of stock and $1,300,000 face value of bonds which were called for by the agreement of April 7, 1930. Thereupon, Furlaud & Company, Inc. delivered its check to Dequesne Gas Corporation in the sum of $3,379,500. This was sup- [fol. 324] posed to represent the proceeds which the gas corporation was to receive for $2,700,000 par value of its six percent bonds, its million dollar issue of gold notes, and 139,000 shares of its capital stock. All of these securities were contemporaneously delivered to Furlaud & Company, Inc. and with the credits which thus came into the treasury of Duquesne Gas Corporation, that Company drew its check for $3,015,000 to Central Hanover Bank and Trust Company in payment of the credit that the bank had advanced

to Kingston Corporation. Throughout the proceedings, representatives of the various security dealers who were to distribute the bonds to the public were waiting without the room in which the foregoing transactions were being consummated. They carried checks for the purchase price of the bonds which their firms had respectively undertaken to distribute. These checks total about $3,000,000 and they were immediately exchanged for about eighty percentum of the whole bond issue. When this had been accomplished, Furlaud & Company, Inc. out of the money so obtained, and with that which had come from Kingston Corporation, liquidated the credit which it had obtained from the Trust Company.

Within a few weeks from the date of closing, Furlaud & Company, Inc. disposed of the balance of the six percent bonds which had come into its hands. When it had done so, there had been a total realization from their distribution of $3,631,671.04. But this was not all. It was but a few weeks until Furlaud & Company, Inc. sold the million dollar issue of the Gas Company's 6½ percent notes to the firm of Cullen & Drew for $861,097.69.

[fol. 325] On June 4, 1930, Kingston Corporation recorded a transfer of bonds of Duquesne Gas Corporation in the face value of $1,300,000 to Furlaud & Company, Inc. by way of a dividend in kind. As a matter of fact, however, the bonds had previously been delivered to Furlaud & Company, Inc., and had been sold.

Finally, Kingston Corporation recorded the sale of 85,000 shares of stock of the gas corporation to the Byron Corporation and to the Chaucer Corporation at fifty cents per share. These concerns sold the same for $850,000.

The foregoing transactions may be summarized as follows:

Furlaud & Company, Inc. received $4,492,768.73 from the sale of the bonds and notes. It paid $2,572,989 to the vendors of the gas properties, and turned over $364,500 to Duquesne Gas Corporation. The latter had that sum plus the physical properties and the $500 it had received for its original issue of 1,000 shares of stock; and was obligated upon all of the securities that had been issued. Bryon and Chaucer Corporation were in pocket $850,000 and Furlaud & Company, Inc. still had possession of 590,-

000 shares of the gas corporation stock, as well as cash in the sum of $1,554,779.73.

Upon the proof before the court, there can be but little doubt that the circulars which Furlaud & Company, Inc. issued in connection with the sale and distribution of the bonds and notes of Duquesne Gas Corporation grossly and fraudulently misrepresented the value of the property by which they were secured. The circulars stated that

"the appraisals of the engineers covering the properties [fol. 326] of the corporation, including working capital of $363,000, aggregate $7,038,000."

The manner in which this excessive appraisal was secured has been related. It was accomplished through the simple expedient of displacing a competent and careful engineer with one who either did not know values, or who was willing to lend himself to the promotion of a bond jobbing operation. When, in addition to this procedure, consideration is given to the incontrovertible fact that the cost of the properties, plus $365,000, amounted only to $2,937,989, it is clearly apparent that the value of the properties as given to the public was wantonly misrepresented. Defendants, it may be remarked, offered no evidence to rebut the conclusion that is compelled by plaintiff's proof.

The circulars further stated that the bonds and notes of the gas company were

"issued by the corporation in connection with the acquisition of properties, and to provide cash for developments, extensions and other corporate purposes."

Defendants argue that this statement was true. In a strictly literal sense there is a modicum of justification for the argument. From the standpoint of fair dealing and honest conduct, the statement was utterly false. No stretch of a straight imagination can reconcile its content with the actualities of the situation. What purchasers of bonds and notes would have believed that out of the sum of $4,492,768.73 which they exchanged for the obligations of the company more than one and one half million dollars would [fol. 327] be appropriated by Furlaud & Company, Inc., and that but a trifle less than three million dollars would be devoted to the corporate purposes of the gas corporation?

That the wrong of a misrepresentation may consist of the quality of its concealment rather than in the nature of its revelation, was made abundantly clear by Lord Halsbury in his opinion in the case of Aaron's Reefs v. Twiss, L. R. (App. Cas. 1896), 273, 285, where he said:

"If by a number of statements you intentionally gave a false impression and induce a person to act upon it, it is not the less false although if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue."

This statement of Lord Halsbury was quoted with approval by the Court of Appeals of this State in Downey v. Finucane, 205 N. Y. 251, 264. In that litigation, as in this, the promoters of a corporation issued a prospectus for the purpose of inducing sales of the corporation's bonds. The circular contained an ambiguous declaration which was interpreted by the promoters to mean that the corporation was obligated to sell bonds in the amount of five million dollars, but that no one was obligated to purchase them. On the trial the jury found that, taking the prospectus as a whole, its language fairly conveyed the impression that contracts had been made which were mutually binding upon the parties thereto under which the corporation was assured of obtaining five million dollars. The Court of Ap- [fol. 328] peals sustained such finding, and held that a general reader would have been misled by the circular. It seems reasonably clear that in the case at bar the purchasers of the bonds and notes of the gas corporation must have been similarly misled. They were induced to part with their money upon a representation that their payments were to be devoted to the legitimate purposes of the obligor corporation, but they were not apprised that their funds should serve unjustly to enrich the company's promoters.

Had the transaction been characterized by forthright honesty, there would have been no need for the check kiting and other legerdemain that marked the flotation of Duquesne Gas Corporation's securities. All that would have been required had the gas corporation been an independent entity, and a free agency, was that Furlaud & Company, Inc. should have advanced the purchase money of the gas properties, together with a contribution of $364,500 to the company's working capital. In return for this, the cor-

poration could have issued its securities, and Furlaud & Company, Inc. could have done with them as it chose. In place of open and above board procedure, the Kingston Corporation was injected into the situation. This was done for the reason that Furlaud & Company, Inc. intended as it used one hand to pour $3,379,500 in to the treasury of the gas corporation, to siphon $565,100 from the treasury with the other. At the end of the complicated series of transactions occurring at the closing, Kingston Corporation was in precisely the same condition as it was at the beginning. Furlaud & Company, Inc. had all the cash over and above the purchase price of the gas properties, that [fol. 329] had come to Kingston Corporation. Furlaud & Company, Inc. also had all of the bonds and notes, and its nominee, Parisette, had all of the gas corporation's corporate stock.

Having come thus far in an analysis of defendant's machinations, it remains to consider if plaintiff in his capacity as a receiver under a creditor's bill, and in a foreclosure suit upon the mortgage securing the bonds, has a standing which will here entitle him to relief against those who defrauded not only the purchasers of the corporate bonds and notes, but also, the gas corporation itself.

Little time need be spent in arguing the question as to what, under other circumstances, might be the ability of Duquesne Gas Corporation to seek recoupment for the wrong practised upon it, having in mind that such corporation was itself party to the wrong done upon the purchasers of its stocks and bonds. That corporation was the creature of Furlaud & Company, Inc. It, in turn, was dominated, controlled and motivated by Furlaud and Reuter. At their behest and procurement, the gas corporation acted as it did. It was they who inflicted upon it the congenital injury that stunted its growth and circumscribed its life. In the belief that the money arising from the sale of the bonds and stock of Duquesne Gas Corporation would be utilized in the development and expansion of its prospects and capacity, the purchasers of such securities were induced to part with their money, a substantial portion of which, instead of reaching Duquesne Gas Corporation, was appropriated by Furlaud & Company, Inc.

In McKee v. Lamon, 159 U. S. 317, the Supreme Court, at page 322, said:

"There can be no doubt of the general proposition that [fol. 330] where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which he may enforce by bill in equity, if not by action at law."

The intention of the giver of the money rather than that of its receiver is determinative of the purpose to which the fund shall be applied. Nor is it essential that the receiver of the fund shall expressly agree that the money be devoted either to a particular purpose, or to a designated third party. The circumstances under which the payments are made may give rise to the existence of a trust duty upon the part of him who recovers the payment. See Sayer v. Winkoop, 248 N. Y. 54. In that case the defendant, an insurance broker, had obtained a policy of Workmen's Compensation insurance in the State Insurance Fund. The insured corporation made two payments of premiums to the broker. The first of these, but not the second, was remitted to the State Fund. Subsequently, the insured corporation became bankrupt, and the receiver of the concern requested defendant to continue the insurance. Five checks, representing premiums upon the policy were sent to defendant. Instead of transmitting the payments to the State Insurance Fund, the defendant cashed the checks and kept their proceeds. The Court of Appeals held that although the broker had made no express promise to pay over the money to the State Fund, he had received the same as a trustee for such purpose, and that, as a result, the State Industrial Commission could hold him therefor, in an action for money had and received.

[fol. 331] Upon the facts here present, it would seem that the receipt by Furlaud & Company, Inc. of the money that it received upon the sale of bonds of Duquesne Gas Corporation, and which, under the circulars, was represented as being intended for the use of such corporation, should give rise to a trust in favor of that corporation which may be asserted by its Receiver. If it be said that Duquesne Gas Corporation was party to the fraud practiced upon the purchasers of its bond, the answer to the charge has already been made. It is that misconduct of the gas corporation is chargeable directly to Furlaud & Company, Inc., which motivated, dominated and controlled all of the activities of its supine and acquiescent agent of fraud and

deceit. When the gas corporation, at the instance and behest of its master, permitted the latter to retain the sum of $1,554,779.73, it, in effect, made a gift of such sum to Furlaud & Company, Inc. It had no license or authority, as against its note and bondholders, so to dispose of their money. While the disposition that was made of the money was in no sense a secret to Duquesne Gas Corporation, it was, in reality, a secret profit to Furlaud & Company, Inc. In other words, that corporation concealed pertinent facts from the persons who purchased bonds and notes in reliance upon the circulars in which the securities of Duquesne Gas Corporation were offered for sale. In a sense, the situation is analogous to those in which promoters have been held liable for profits accruing to themselves through the misrepresentation of the true value of property conveyed to a corporation, when reliance upon such misrepresentation has been had by innocent purchasers of the stock of the corporation. See Davis v. Las Ovas Com- [fol. 332] pany, 227 U. S. 80; Walker v. Pike Co. Land Co., 139 Fed. 609; cf. Gates v. Megargel, 266 Fed. 811 (C. C. A. 2nd). It is difficult to see how, if at all, the action of Furlaud & Company, Inc. is a whit less reprehensible than the acts of the promoters in the cases just cited.

In considering the right of the Receiver of Duquesne Gas Corporation to maintain this suit, it must be remembered that the receiver represents not only the corporations, but all those having an interest in its properties as well. See Atlantic Trust Company v. Chapman, 208 U. S. 360, 371; Graselli Chemical Company v. Aetna Explosive Company, 252 Fed. 456 (C. C. A. 2nd). To employ the language of the court in Westinghouse Electric & Manufacturing Company v. Binghamton Railway Company, 253 Fed. 378, at page 385, it may be said that

"a receivership is for the benefit and protection of all interests, general creditors, secured creditors (bondholders) and stockholders, and it is the duty of the court, so far as reasonably possible, to conserve and protect all interests."

It has frequently been held that a receiver can disaffirm fraudulent contracts and conveyances which the corporation could not disaffirm, and also, that the receiver can

recover for the wrong that has been wrought upon the creditors. Hamor v. Taylor Rice Engineering Company, 84 Fed. 392; Pittsburgh Carbon Company v. McMillin, 119 N. Y. 46; See Thompson on Corporations, 3rd Ed., Sec. 6436; Smith, Law and Procedure of Receivers, 2nd Ed., Section 357. Although it may be that Duquesne Gas Cor- [fol. 333] poration might not be able, in its own right, to hold Furlaud & Company, Inc. and its masters to accountability for the fraud that was here worked, simple justice requires that the receiver, in his representative capacity, should be able to vindicate the rights of creditors who were victimized. If a court of equity is to function within the domains of conscience, and if it is to redress the wrongs that occur within that dominion, it must provide a remedy that is capable of checkmating the ingenuity that here perpetrated a grievous wrong.

At this point, it may not be amiss to record the genealogy of Furlaud & Company, Inc. Originally incorporated under that name on July 18, 1928, it became known as Furlaud, Reuter & Company, Inc. on August 1, 1930. Upon October 10, 1931, that name was changed to Winchelsea Holding Corporation. Seventeen days later it was dissolved. Throughout the period of its existence, Maxime H. Furlaud, as has been told, was a director, president and principal stockholder of the concern. Also, as has been related, he was a participant in all that gave rise to this suit, and possessed full knowledge thereof. As the guiding spirit, and conscious participant in the wrongs that were done, he incurred liability to the receiver for the trust funds which he diverted from the corporation. Anderson v. Daley, 38 A. D. 505, appeal dismissed, 149 N. Y. 146. In that case, one Daley was a bookkeeper, stockholder, officer and director of Devlin & Company, a business corporation. As trustee under the Will of Albert Ward he deposited moneys of the Ward Estate with the corporation, which subsequently became insolvent. In the meantime, one Jones, another director of Devlin & Com- [fol. 334] pany, died, and the beneficiaries of the Ward Estate brought action to charge the Jones Estate with the balance due to the Ward Estate by the corporation. The Court held that they could recover, saying—

"It (the proof) does, however, clearly establish that Jones was aware of the insolvent condition of the corpo-

ration, and he also had knowledge that moneys of the estate were being furnished by the trustee and used in the business of the corporation. He was an active participant in the use of such moneys. * * * the evidence is clearly sufficient to charge him with knowledge and participation in their use for the business of the corporation, and therefore, for his own benefit; and this is sufficient to charge him with liability. * * * *Nor can he shield himself by the fact that in what he did he acted as an officer of the corporation. The corporation could only act through its officers, and it is not essential that the misuse of the trust funds should be for the exclusive benefit of the person making such unlawful use, or indeed any benefit at all. Where he possesses the knowledge of the misuse of the trust funds, and knowingly applies them either for his own benefit or for the benefit of another, his liability is complete, as the injury to the estate is the same whether he do it as an officer or as an individual. The basis of his liability is knowledge and injury, both of which here exist.*'' (Italics mine.)

[fol. 335] In Virginia-Carolina Chemical Company v. Ehrich, 230 Fed. 1005, it was held that a suit to charge the officers and directors of a corporation with personal liability for the misappropriation by the corporation of money held by it as trustee, was properly brought in equity, upon the theory that the directors were under a duty to exercise reasonable care to supervise the activities of the corporation. The plaintiff, in fact, failed to prove neglect of duty on the part of the defendants in that case, but the implication was clear that they would have been held liable if such neglect had been proven.

The present suit presents a much stronger case for the imposition of liability upon the defendant Furlaud than either of these two cases. The evidence here shows much more than neglect of duty as a director; it shows active participation by the directing personality of the corporation in the transactions which resulted in a misappropriation of money received in trust. Under the foregoing decision, his personal liability is clear.

The defendant, Kingston Corporation, is under a liability for similar reasons. It took part in every step of the proceedings. It received bonds from Duquesne Gas

Corporation and turned them over to Furlaud & Company, Inc. without receiving any consideration therefor. It made a gift to Furland & Company, Inc. of the $565,100, which it had received as part of its consideration for transferring the various gas properties to Duquesne Gas Corporation. It thus knowingly acted as a conduit through which Furlaud & Company, Inc., its sole stockholder, was enabled to appropriate to its own use money intended to be paid over to Duquesne Gas Corporation. As an agent of Furlaud & Company, Inc., that participated in the com- [fol. 336] mission of a breach of trust, it is severally liable to account for the sums diverted. Cf. Iroquois Iron Company v. Kruse, 241 Fed. 433.

The defendants, Byron and Chaucer Corporation, however, are under no liability with respect to the issuance of the bonds and notes since they had no part in any of the transactions through which the trust funds were appropriated.

So far I have dealt only with the profits realized from the sale of the bonds and notes. Plaintiffs also urge that the defendants should be required to account for the profits in the sum of $850,000 which were received by Byron and Chaucer Corporations from the sale of 85,000 shares of the stock of Duquesne Gas Corporation to J. J. Bergen, a dealer in stocks. This stock, although originally issued in the name of Parisette, Furlaud & Company's nominee, was subsequently transferred to Kingston Corporation, which in turn transferred it to Byron and Chaucer Corporations. At the time that the transactions through which Duquesne Gas Corporation acquired the various gas properties were consummated, and for some time thereafter, Furlaud & Company, Inc. owned every share of its capital stock, and ratified and approved of the whole transaction. However much the persons who subsequently purchased stock from Byron and Chaucer Corporations may have been injured, it does not seem that the receiver can recover on behalf of Duquesne Gas Corporation, under the doctrine announced in the case of Old Dominion Copper Company v. Lewishon, 210 U. S. 206. Nor can he recover, as in the case of the bonds and notes, on the theory that the money paid in by purchasers of stock became impressed with a trust in favor of the corporation. This is so for

[fol. 337] the reason that the evidence does not show that any representation was made, by circulars or otherwise, that the money so received would be paid over to Duquesne Gas Corporation. The complaint, therefore, will be dismissed as against the defendants, Byron Corporation and Chaucer Corporation.

Plaintiff may have a final decree against the defendants, Maxime H. Furlaud and Kingston Corporation. There is no necessity for the expense and delay of a lengthy accounting proceeding before a Special Master. Upon the evidence before the court, it is clear that the amount of trust money diverted from Duquesne Gas Corporation was $1,554,779.73; the difference between the $4,492,768.73 realized by Furlaud & Company from the sale of the bonds and notes, and the $2,937,989.00 actually devoted to the legitimate corporate purposes of Duquesne Gas Corporation. There is no occasion to determine any offset to this amount by way of expenses incurred, or reasonable compensation to Furlaud & Company for its activities in connection with the sale of the securities. A trustee is not entitled to be reimbursed for any money which he expends in the course of defrauding his beneficiary. Commonwealth Finance Corporation v. McHarg, 282 Fed. 560 (C. C. A. 2nd).

Decree for Plaintiff against the defendants, Maxime H. Furlaud and Kingston Corporation in the sum of $1,554,779.73.

April 14, 1933.

Jno. C. Knox, U. S. D. J.

[fol. 338] In United States District Court

George W. McCandless, as Receiver of Duquesne Gas Corporation, Complainant,

vs.

Maxime H. Furlaud, Carlos Reuter, Kingston Corporation, Byron Corporation and Chaucer Corporation, Defendants

Present: Hon. John C. Knox, U. S. D. J.

Order That Opinion Stand for Findings, etc.—May 11, 1933

This cause having come on to be heard before the Honorable John C. Knox, one of the Judges of the United States

District Court for the Southern District of New York on the 9th day of November, 1932, and this case having been argued by counsel, testimony and proof having been introduced and the Court having handed down its opinion dated the 14th day of April, 1933, it is hereby

Ordered, adjudged and decreed that the opinion heretofore filed on the 14th day of April, 1933, stand as the findings of fact and conclusions of law in this case and be deemed to constitute the formal decision thereof.

Jno. C. Knox, U. S. D. J.

[fol. 339] In United States District Court, Southern District of New York

E-66-185

George W. McCandless, as Receiver of Duquesne Gas Corporation, Complainant,

vs.

Maxime H. Furlaud, Carlos Reuter, Kingston Corporation, Byron Corporation and Chaucer Corporation, Defendants

Final Decree

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, this Court being duly advised in the premises, it is

Ordered, adjudged and decreed, that complainant George W. McCandless, as Receiver of Duquesne Gas Corporation, do have and recover of and from defendants Maxime H. Furlaud and Kingston Corporation, and each of them, the sum of One million, eight hundred thirty four thousand, six hundred forty and 8/100 Dollars ($1,834,640.08), being the amount (including interest to this date) found by the Court to be owing by said defendants to the complainant on an accounting of the matters referred to in the complaint with interest thereon at the rate of six per cent. [fols. 340-372] (6%) per annum from this date, together with his costs and disbursements herein, for which let execution issue, and it is

Ordered, adjudged and decreed, that the bill of complaint herein be and the same hereby is dismissed as to defend-

ants Byron Corporation and Chaucer Corporation on the merits without costs.

Dated, New York City, May 11, 1933.

Jno. C. Knox, U. S. D. J.

[fol. 373] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1933

No. 199

Argued December 11, 1933. Decided January 8, 1934

George W. McCandless, as Receiver of Duquesne Gas Corporation, Complainant-Appellee-Appellant,

v.

Maxime H. Furlaud and Kingston Corporation, Defendands-Appellants-Appellees, and Byron Corporation and Chaucer Corporation, Defendants-Appellees, and Carlos Reuter, Defendant

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, L. Hand, and Chase, Circuit Judges

Suit by George W. McCandless, receiver of Duquesne Gas Corporation, to recover for breach of trust and resulting damages. Decree for the plaintiff against the defendants Maxime H. Furlaud and the Kingston Corporation, and dismissing the bill against the Byron Corporation and Chaucer Corporation. Defendants Furlaud and Kingston Corporation appeal; plaintiff also appeals. Decree reversed, with directions to dismiss the bill.

Ehrich, Royall, Wheeler & Walter, of New York City (Ralph Royall, Bartow H. Hall, and James G. Holland, all of New York City, and William A. Magee, and Clark Miller, both of Pittsburgh, Pa., of counsel), for complainant.

Eppstein & Hirshfield, of New York City (Louis B. Eppstein, Ira W. Hirshfield, and Louis J. Altkrug, all of New York City, of counsel), for appellants Maxime H. Furlaud and Kingston Corporation.

OPINION

MANTON, Circuit Judge:

These are cross-appeals. Furlaud and Kingston Corporation appeal from a judgment of $1,834,640.08 against them for damages for breach of trust. The receiver appeals from a refusal to decree $850,000 more; also from the dismissal of the suit against the Byron Corporation and Chaucer Corporation.

The plaintiff was appointed receiver of the Duquesne Gas Corporation in the Western District of Pennsylvania, having been appointed such on a stockholder's bill and a consent thereto by the Duquesne Gas Corporation. The bill of complaint, in this suit, alleges the appointment in the Western District of Pennsylvania, on January 19, 1932, stating that the receiver was appointed "of all the assets and property, including choses in action, of said Duquesne Gas Corporation, and the complainant has duly qualified and is now acting as such Receiver; that upon petition of the complainant as such Receiver duly filed in the United States District Court, in and for the Southern District of New York, an order was duly made on the 23rd of March, 1932 by said last mentioned Court appointing said complainant George W. McCandless, as Ancillary Receiver of [fol. 374] Duquesne Gas Corporation which last mentioned order duly authorized the complainant, as such Receiver, to bring this suit, and the complainant has duly qualified and is now acting as such Ancillary Receiver."

The answer of the defendants denied this allegation and required proof thereof. The order appointing the plaintiff ancillary receiver after reciting the appointment in the Western District of Pennsylvania reads:

"Ordered, adjudged and decreed that George W. McCandless be and he is hereby appointed ancillary receiver of Duquesne Gas Corporation in and for the Southern District of New York to carry into force and effect the order of the court of original jurisdiction, and it is further

"Ordered, adjudged and decreed that said ancillary receiver is hereby authorized to bring an action against the promoters of said corporation * * * for an accounting and for the restitution of funds * * *"

The substance of this bill is that the banking house of Furlaud & Co., Inc., of which the defendant Furlaud was

president, received the proceeds of a public sale of securities of the Duquesne Gas Corporation in a fiduciary capacity, for that corporation, and became accountable as a trustee but, instead of accounting for the fund, diverted and misappropriated about one-half of the moneys received; that they caused the corporation Furlaud & Co., Inc., to be dissolved; that the defendants Kingston Corporation, Byron Corporation, and Chaucer Corporation were dummy corporations, used in attempting to cover up diversions and misappropriations.

This claim arises out of the following facts: Furlaud & Co., Inc., of New York City with offices there, early in 1930, with the defendant Furlaud, carried on a banking business. He and one Reuter, not served with process, were the chief stockholders and with other employees, directors, and officers, early in 1930, negotiated with the owners of nine gas properties located in the Pittsburgh, Pa., region and obtained options, without consideration, for their purchase by the Kingston Corporation. They employed an engineering firm, and about February 1, 1930, it made written reports appraising five of the properties at $1,700,000. These were purchased at about $1,300,000. The other four properties were appraised by other engineers at $5,000,000 in February, 1930, and the purchase price was about $1,200,000. Thereupon the Duquesne Gas Corporation was organized in Pennsylvania with 1,000 shares of no par value. In February, 1930, it was arranged with the various optionors for the execution of the assignments of the various gas properties by placing instruments of conveyance in escrow with banks located in Pittsburgh and Washington, Pa., and other convenient places. The instruments of conveyance, as deposited, ran to the gas corporation as transferee. The deposit agreement provided that the escrow banks, when notified by Furlaud, were to present drafts upon the Duquesne Gas Corporation for the respective balances of the purchase price, payable in New York, and that the banks, upon having telegraphic advices from their correspondent banks in New York that the drafts had been accepted, were to deliver the conveyances to named persons being the employees of the firm of attorneys who were in charge of carrying out the corporate proceedings. The aggregate balance of the purchase price of the nine properties payable under the escrow agreements was $2,449,900.

There was organized a bankers' syndicate and a distributing group for the issuance and sale of $4,000,000 of Duquesne Gas Corporation first mortgage 6 per cent. convertible gold bonds. Furlaud & Co., Inc., were the syndicate managers and, with four other banking houses, publicly announced the issue for sale on March 25, 1930, and about forty dealers in securities became the distributing group and sold the bonds. They were offered at 97½ and the distributing group were given 4 per cent. commission. Necessary proceedings were taken for the authorization of the bond issue, with a corporate mortgage to secure it, and for an issue of $1,000,000 of notes and for an increase of the capital stock from 1,000 shares to 1,250,000 shares without par value. The security for the bond issue was a mortgage covering the properties. It was out of these funds that payments for the oil properties were made. In our disposition of the case, it is sufficient to say that the net proceeds from the sale of the $4,000,000 bond issue is shown to have been $3,631,671.04; from the sale of the total note issue, $861,097.69; from the sale of 85,000 shares of stock, $850,000—a total of $5,342,768.23. The cost of the properties, including the working capital put in by the bankers, amounted to $2,937,989. It is shown that the amount received by the bankers from the bonds, notes, and stocks now [fol. 375] claimed to have been diverted and misappropriated to their own use, is $2,404,779.73. Whether this was a misappropriation of the funds or a legitimate profit we need not now decide.

The legal sufficiency of the appointment of the plaintiff as an ancillary receiver in the Southern District of New York was put in issue by the answer and he bears the burden of establishing its legality. Grant v. Leach & Co., 280 U. S. 351, 50 S. Ct. 107, 74 L. Ed. 470. The record of the ancillary proceedings in evidence consisted of: (a) A petition of the receiver, captioned "Frank T. Harrington, Complainant, against Duquesne Gas Corporation, Defendant," in the United States District Court for the Southern District of New York and annexed to the petition; (b) the amended bill of complaint filed in the Western District of Pennsylvania, captioned "Frank T. Harrington, Complainant, against Duquesne Gas Corp., Defendant"; (c) amendment to the prayer for relief in the action in the Western District of Pennsylvania; (d) answer of the de-

fendant in the action referred to in (b); (e) a certified copy of the resolution of the board of directors of the Duquesne Gas Corporation, annexed to the answer filed in the Western District of Pennsylvania; (f) the answer of the defendant Duquesne Gas Corporation filed in an action brought in the Western District of Pennsylvania, by the trustee under the first mortgage of the Duquesne Gas Corporation; (g) the decree entered in the Western District of Pennsylvania; (h) a certificate of the clerk of the District Court for the Western District of Pennsylvania, certifying that a receiver's bond of $50,000 had been filed. On these papers the District Court for the Southern District of New York appointed the plaintiff ancillarly receiver of the Duquesne Gas Corporation in this district, and authorized this suit ti be brought against the promoters of the corporation for an accounting and for the restitution of funds, fraudulently diverted and misappropriated, and for secret and excessive profits. Thus, upon the petition alone of a foreign federal receiver, an ancillary receiver is appointed, where no bill had been filed in the jurisdiction by any party aggrieved praying for such relief. No process was issued in this jurisdiction and there has been no appearance or answer filed by the corporation within the district. This suit was instituted shortly after such appointment.

It has long been settled that an equity receiver is an officer of the court appointing him and, as such, he has no status and cannot be sued in a district other than the one in which he was appointed and he cannot recover property or assets of the corporation in receivership even though he may have been authorized to do so by the court of his original appointment. Booth v. Clark, 17 How. 322, 15 L. Ed. 164; Sterett v. Second Natl. Bank, 248 U. S. 73, 39 S. Ct. 27, 63 L. Ed. 135; Great Western Mining & Mfg. Co. v. Harris, 198 U. S. 561, 25 S. Ct. 770, 49 L. Ed. 1163; Hale v. Allinson, 188 U. S. 56, 23 S. Ct. 244, 47 L. Ed. 380. Nor may foreign receivers sue outside the district as a matter of comity even by obtaining permission before suit is commenced. Moore v. Mitchell, 281 U. S. 18, 24, 50 S. Ct. 175, 74 L. Ed. 673; Fowler v. Osgood, 141 F. 20, 4 L. R. A. (N. S.) 824 (C. C. A. 8). Moreover, the usual practice is to obtain an ancillary receiver by an independent bill requesting it. Indeed, it has been said that such an independent bill is required. Mercantile Trust Co. v. Kanawha

Ry. Co. (C. C.) 39 F. 337. Even if there are assets in the foreign jurisdiction, the court there has a right to appoint a receiver only in a pending suit where independent relief is asked. To permit a foreign receiver to obtain an ancillary appointment, on an ex parte application, improperly avoids the rule denying foreign receivers the right to sue in the foreign jurisdiction. The appointment of such receiver does not give him authority to acquire possession of property beyond the jurisdiction of his appointment. The right of a receiver to sue in a foreign court cannot be upheld as a mere incident to the office of a receiver. The appointing court cannot clothe him with such power and any attempt to confer any such authority on him is futile. Hilliker v. Hale (C. C. A.) 117 F. 220; Greene v. Star Cash & Package Co. (C. C.) 99 F. 656; In re Brant (C. C.) 96 F. 257; Mercantile Trust Co. v. Kanawha Ry. (C. C.) 39 F. 337. The authority to sue is sufficiently raised by the denial of the allegation that the receiver was duly appointed. Grant v. Leach & Co., 280 U. S. 351, 50 S. Ct. 107, 74 L. Ed. 470; Fairview, etc., Co. v. Ulrich, 192 F. 894 (C. C. A. 7).

While ancillary receiverships are usually conducted in the spirit of comity, with a view of avoiding unnecessary conflict in the administration of the trust, they are, how- [fol. 376] ever, in all respects the proceeding in two respective causes, each resting upon its own distinct basis. Ancillary proceedings are independent suits and there must be a plaintiff and a defendant and the first must be one who claims injury committed by the defendant. One who is not aggrieved cannot come into court and ask for the appointment of an ancillary receiver. Lack of title to the property is more than a mere technicality. It involves the very substance of a right to file the independent bill. Street's Equity Practice, vol. 3, § 2542; Walker v. U. S. Light & Heating Co. (D. C.) 220 F. 393. The appointment of the plaintiff as ancillary receiver was void, and he did not acquire, in any of the proceedings, a status to warrant the institution of this suit.

Decree reversed.

[fol. 377] In United States Circuit Court of Appeals, Second Circuit

George W. McCandless, as Receiver, etc., Plaintiff-Appellant,

vs.

Maxime H. Furlaud and Kingston Corporation, Defendants-Appellants; Byron Corporation and Chaucer Corporation, Defendants-Appellees; Carlos Reuter, Defendant

Judgment—Filed Jan. 15, 1934

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, reversed with costs to the defendants.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 378] [File endorsement omitted.]

[fol. 379] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 380] Supreme Court of the United States

Order Allowing Certiorari—Filed April 30, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the questions pertaining to the validity of the appointment of the petitioner as ancillary receiver, and his right as such to maintain this suit.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 381] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING OF RECORD—Filed May 23, 1934

It is hereby stipulated that the record herein shall omit all except the following portions of the record and proceedings below:

1. Statement under Rule XIII (pages 1-3 of C. C. A. record).
2. Amended bill of complaint (pages 5-18 of C. C. A. record).
3. Answer of Kingston Corporation (pages 45-51 C. C. A. record).
4. The statement that:

"Similar answers were interposed by defendants Maxime H. Furlaud, Byron Corporation and Chaucer Corporation."

5. Plaintiff's Exhibit 1 (pages 183-234 of C. C. A. record).
6. Opinion by Knox, D. J. (pages 318-337 of C. C. A. record).
7. Order that opinion stand for findings (page 338 of C. C. A. record).

[fols. 382 & 383] 8. Final decree (pages 339-340 of C. C. A. record).

9. The usual papers as to the proceedings in the Circuit Court of Appeals as certified by the Clerk thereof to the Supreme Court, including the opinion of Judge Manton in the Circuit Court of Appeals.
10. This stipulation.

Items 6 and 7 are to be included in the record at petitioner's request. Respondents do not approve this inclusion because they feel that the opinion of Judge Knox does not concern itself with the issues upon which this Court granted certiorari.

Dated, New York City, May 17, 1934.

Ralph Royall, Counsel for Petitioner. Louis B. Eppstein, Counsel for Defendants-Respondents.

[fol. 384] [File endorsement omitted.]

Endorsed on cover: File No. 38,504. U. S. Circuit Court of Appeals, Second Circuit. Term No. 11. George W. McCandless, as Receiver of Duquesne Gas Corporation, Petitioner, vs. Maxime H. Furlaud, Kingston Corporation, Byron Corporation, et al. Petition for a writ of certiorari and exhibit thereto. Filed March 28, 1934. File No. 11, O. T., 1933.

(5078-C)

FILE COPY

MAR 28 1934
CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States

October Term, 1933

No. [redacted] . 11

GEORGE W. McCANDLESS, as Receiver of Duquesne Gas Corporation,
Petitioner (Complainant-Appellee-Appellant Below),

against

MAXIME H. FURLAUD and KINGSTON CORPORATION,
Defendants-Appellants-Appellees Below,

and

BYRON CORPORATION and CHAUCER CORPORATION,
Defendants-Appellees Below,

and

CARLOS REUTER,
Defendant Below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

RALPH ROYALL,
WILLIAM A. MAGEE, and
CLARK MILLER,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1933

No. .

GEORGE W. MCCANDLESS, as Receiver of Duquesne Gas Corporation,
Petitioner (Complainant-Appellee-Appellant Below),

against

MAXIME H. FURLAUD and KINGSTON CORPORATION,
Defendants-Appellants-Appellees Below,

and

BYRON CORPORATION and CHAUCER CORPORATION,
Defendants-Appellees Below,

and

CARLOS REUTER,
Defendant Below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Charles E. Hughes, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

George W. McCandless, as Receiver of Duquesne Gas Corporation, complainant-appellee-appellant below,

the above named petitioner, respectfully prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit, filed on the 8th day of January, 1934, reversing the final decree filed in the United States District Court for the Southern District of New York on the 11th day of May, 1933, which awarded a judgment to complainant against the defendants Maxime H. Furlaud and Kingston Corporation in the sum of $1,834,640.08.

Statement

This is a suit brought by the petitioner as complainant in his capacity as ancillary receiver of Duquesne Gas Corporation, appointed as such in the District Court of the United States for the Southern District of New York (R. 5-7). After a trial before United States District Court Judge Knox, a decree was made awarding judgment to the complainant against the defendants Maxime H. Furlaud and the Kingston Corporation in the sum of $1,834,640.08 and dismissing the complaint as to the defendants Byron Corporation and Chaucer Corporation (R. 339-40). The defendant Carlos Reuter was not served with process and did not appear (R. 1).

The defendants Maxime H. Furlaud and Kingston Corporation appealed from such decree to the Circuit Court of Appeals, Second Circuit, and the complainant took a cross appeal claiming that judgment should be awarded against each of the defendants Byron Corporation and Chaucer Corporation in the sum of $425,000 with interest, and also that the judgment against the

defendants Maxime H. Furlaud and Kingston Corporation should be increased by the amount of $850,000 with interest.

Upon the appeal the defendants Maxime H. Furlaud and Kingston Corporation raised for the first time the question of the complainant's title to sue. The claim of these defendants was that the appointment of the complainant (this petitioner) as ancillary receiver in the District Court for the Southern District of New York was void and that such appointment could be collaterally attacked and that the judgment which had been granted in favor of the complainant as such ancillary receiver should be vacated and set aside. The Circuit Court of Appeals adopted this view and its decree dated the 8th day of January, 1934, which this petitioner now seeks to have reviewed, reversed the judgment. The Circuit Court of Appeals refrained from deciding the merits.

The subject matter of the suit is the promoting in 1930 by the defendants Maxime H. Furlaud and Carlos Reuter of the Duquesne Gas Corporation, of which the complainant is the receiver, and the public issue by them of $4,000,000 of bonds and $1,000,000 of notes of said corporation and the sale by them of a part of the stock of said corporation for $850,000.

The facts as found by the District Judge and which are undisputed are, very briefly stated, that, acting through an incorporated banking house, known as Furlaud & Company (R. 318) (later known as Furlaud, Reuter & Company and still later known as Winchelsea Holding Corporation and which corporation was dissolved before the commencement of this suit (R. 333, 155-6)), the defendants Furlaud and Reuter caused

their banking house to publicly circulate banking circulars covering the issue of such bonds and notes, which circulars stated in effect that the proceeds of the issue of these bonds and notes would be used for the purchase of the properties of Duquesne Gas Corporation and for the other corporate purposes of that corporation (R. 326, 263-71, 276-84).

As the District Court also found, and as was also undisputed, the defendants procured fraudulent and highly excessive appraisals of the natural gas properties which the Duquesne Gas Corporation was organized to acquire and operate (R. 319-20, 325-6). It was the use of these fraudulent appraisals which made it feasible for the defendants to consummate their fraud upon the Duquesne Gas Corporation and its creditors as well as upon the public who subscribed to the bonds and notes.

It was also found by the District Court that these properties, which cost less than one-third of the amount of the fraudulent appraisals, were paid for out of the proceeds of the bonds and notes, out of the proceeds of which also came the $365,000 of working capital which, together with the gas properties, was all that the corporation ever received out of the proceeds of the bonds and notes or for its stock (R. 325-6, 121).

As a result of the issuance of these circulars, these defendants through their banking house received $4,492,-768.73 from the sale of the bonds and notes, of which they turned over to the Duquesne Gas Corporation or used for its benefit only the sum of $2,937,989.90. They misappropriated and converted to their own use the difference, viz. $1,554,788.83 (R. 325). This sum, with

interest computed upon it to the time of the judgment, amounted to the sum of $1,834,640.08, which is the amount of the judgment granted (R. 339).

The corporation was by the fraudulent acts of the defendants rendered insolvent at its start and, as was inevitable, receivership soon occurred.

The District Court properly held that under the doctrine of this Court's decision in the case of *McKee* v. *Lamon*, 159 U. S. 317, 40 L. Ed. 165, 16 S. C. 11 (1895) a trust arose in favor of Duquesne Gas Corporation from the fact that the moneys subscribed for the bonds and notes were placed in the hands of the banking house of the defendants to be paid over or used to or for the benefit of Duquesne Gas Corporation (R. 329-31), and that this trust could be enforced by the receiver of such corporation. The District Court also properly held that these fraudulent promoters did not have immunity from accountability for this breach of trust under the doctrine of the decision of *Old Dominion Copper Company* v. *Lewisohn*, 210 U. S. 206, 52 L. Ed. 1025, 28 S. C. 634 (1908).

The District Court, however, held that the situation as to accountability by Furlaud and Reuter for the stock of the corporation was different. These defendants had all of the issued stock of the corporation, viz. 675,000 shares, gratuitously issued to themselves in the name of a dummy, and then had the stock listed upon the New York Curb Exchange and sold 85,000 shares of it, through the agency of defendants Byron Corporation and Chaucer Corporation, to a Curb Exchange operator for the sum of $850,000 cash (R. 336).

These last mentioned corporations and the defendant Kingston Corporation were dummies used by the individual defendants in perpetrating the fraud.

The District Court held, erroneously we believe, that under the doctrine of this Court's decision in the *Old Dominion* case, the fraudulent promoters had immunity from accountability for the $850,000 received by them as the proceeds from the sale of a part of the stock (R. 336).

While clearly there is a real legal distinction between the different situations presented in respect of the defendants' accountability, we believe, nevertheless, that this Court's decision in the *Old Dominion* case does not give immunity from accountability to these fraudulent promoters for the $850,000 proceeds of a part of the stock.

The facts of the case which are thus very briefly summarized are more fully stated in the opinion of United States District Judge Knox which is printed at pages 318-37 of the Record and reported in 4 Fed. Supp. 884 (advance sheets only).

As above indicated, the opinion of the Circuit Court of Appeals refrained from dealing with the merits and based its reversal of the judgment wholly upon the proposition that the appointment of the petitioner as ancillary receiver in the Southern District of New York was void.

The sole reason for this determination was that the appointment of the petitioner as ancillary receiver was made in the United States District Court for the Southern District of New York upon the petition of the petitioner herein made by him as the primary receiver, acting under his appointment as such in the United States Dis-

trict Court for the Western District of Pennsylvania, rather than upon a separate ancillary bill by a creditor of the corporation against the corporation in the United States District Court for the Southern District of New York.

The petitioner was duly appointed as primary or domiciliary receiver of Duquesne Gas Corporation in the District Court of the Western District of Pennsylvania, in which the Duquesne Gas Corporation was domiciled and within the confines of which all of its tangible property was situated. Such receivership was granted in two suits: one a suit by a stockholder brought in the United States District Court for the Western District of Pennsylvania, and the other a suit brought in that Court by the trustee under the mortgage securing the bonds. These suits were consolidated and *the corporation then appeared and consented to a decree for the appointment of a receiver.* The petitioner was thereupon appointed such receiver and duly qualified and has ever since been acting as such (R. 183-234). The validity or propriety of the primary receivership proceedings has not been questioned.

As the defendants who would have to be sued were to be found in New York rather than in the Western District of Pennsylvania, it was necessary under the doctrine established by the decision of this Court in the case of *Booth* v. *Clark,* 17 How. 322, 58 U. S. 322, 15 L. Ed. 164 (1855) that the petitioner be appointed ancillary receiver in the Southern District of New York in order there to maintain the suit. Therefore, the petitioner filed

his petition in the Southern District of New York setting forth his appointment as primary receiver and attaching thereto exemplified copies of the proceedings in the United States District Court of the Western District of Pennsylvania relating to his appointment as primary receiver and asking for the appointment of an ancillary receiver. The petition alleged the existence of the cause of action against the New York defendants.

The order of the District Court of the Southern District of New York appointing the petitioner ancillary receiver, dated March 23, 1932, is printed at pages 232-234 of the Record. It recites that it is made,

> "Upon the annexed bill of complaint filed in the above entitled suit in the United States District Court for the Western District of Pennsylvania, and upon the answer of the defendant therein to said amended bill of complaint, *and upon the per curiam decree therein of the United States District Court for the Western District of Pennsylvania, dated the 19th day of January, 1932, appointing George W. McCandless receiver of the assets*, lands, tenements and hereditaments of the defendant Duquesne Gas Corporation, and all of its property real and personal, *including choses in action*, and upon the certificates of the Clerk of the United States District Court for the Western District of Pennsylvania of the filing and the approving of the bond of said receiver, and upon reading and filing the petition of said George W. McCandless, duly verified the 23rd day of March, 1932, from which it appears to the satisfaction of the Court that there is need of an ancillary receivership in this district."

and provides that it is

> "ORDERED, ADJUDGED AND DECREED that George W. McCandless be and he hereby is appointed ancillary receiver of Duquesne Gas Corporation in and for the Southern District of New York to carry into force and effect the order of the Court of original jurisdiction.

This order authorized the beginning of this suit and provided (R. 234) for a bond of $25,000 "and that upon any moneys or funds coming into his hands said ancillary receiver shall immediately report the fact to the Court and submit to the Court the question of an increase of this bond."

The record does not disclose the existence of any tangible property of Duquesne Gas Corporation within the Southern District of New York, nor is the existence of any such property known. The case was submitted for decision in the Circuit Court of Appeals upon the statement made in open Court by counsel that there was no tangible property within the Southern District of New York. The property in the Southern District of New York is confined to the intangible property, consisting of the chose in action upon which the petitioner brought this suit.

The Questions Presented

(1) Was not the appointment by the United States District Court for the Southern District of New York by the order of that Court entered on the 23rd day of March, 1932 of the petitioner as ancillary receiver in the

Southern District of New York of Duquesne Gas Corporation valid?

(2) Did not the petitioner have, as such ancillary receiver, good right and title to maintain this suit?

(3) Did not the petitioner in his capacity as primary receiver have good right and title to maintain this suit?

(4) Should not the final decree entered in the United States District Court, dated May 11, 1933, awarding to the petitioner a judgment of $1,834,640.08 against the defendants Maxime H. Furlaud and Kingston Corporation be reinstated and modified by increasing the amount thereof by the sum of $850,000 with interest, and by awarding judgment also as against each of the defendants Byron Corporation and Chaucer Corporation in the sum of $425,000 and interest.

Reasons for the Allowance of the Writ

(1) The decision of the Circuit Court of Appeals is clearly erroneous. The appointment of an ancillary receiver upon the petition of the primary receiver for the mere purpose of bringing a suit in a jurisdiction foreign to that of the primary appointment does not, as stated by the Circuit Court of Appeals, violate the rule of *Booth* v. *Clark,* or the reason for that rule. The reason for the rule in *Booth* v. *Clark* for not permitting a receiver by comity to sue outside of the jurisdiction of the Court appointing him is that it might result in removing assets from a foreign jurisdiction to the place of the receiver

against the interest of the creditors who are residents of the foreign jurisdiction. Manifestly, the foreign creditors are as well protected whether the ancillary receiver's appointment is made upon the petition of the primary receiver or upon a separate creditor's bill.

(2) The opposite decision of the question has been arrived at or at least strongly indicated by the decision of the Circuit Court of Appeals in the Eighth Circuit in the case of *Rust* v. *United Water Works,* 70 Fed. 129. The opposite decision of the question, is also clearly indicated in the Third Circuit in the decision of the Circuit Court of Appeals of that Circuit in the case of *Bluefields S. S. Co.* v. *Steele,* 184 Fed. 584.

(3) This Court has in its decision in the case of *Bernheimer* v. *Converse,* 206 U. S. 516, 51 L. Ed. 1163, 27 S. C. 755 (1907), greatly limited its decision in the case of *Booth* v. *Clark* which later decision is completely inconsistent with the Court's former decision so far as the reason for the doctrine is concerned, viz. the protection of foreign creditors. This Court has ingrafted further limitation upon the doctrine of *Booth* v. *Clark* in the case of *Grant* v. *Leach & Co.,* 280 U. S. 351, 74 L. Ed. 470, 50 S. C. 107 (1930).

The Courts of several of the States refuse to adopt the doctrine of *Booth* v. *Clark* and hold that the ordinary type of receiver in equity appointed by a Court in a foreign jurisdiction will by comity be permitted to sue in their Courts, while the Courts of the other States, although adopting and applying the general doctrine of *Booth* v. *Clark,* have ingrafted many exceptions upon it.

The question seriously arises whether the doctrine of *Booth* v. *Clark* any longer serves a useful purpose and whether the time has not come when it should be completely abandoned by this Court.

(4) The District Court had a mistaken conception that, under the doctrine of this Court's decision in the case of *Old Dominion* v. *Lewisohn, supra,* the defendants had to be granted immunity from accountability for their fraudulent acts in misappropriating the capital stock of Duquesne Gas Corporation and the $850,000 received by them from the sale of a part of it.

Importance of the Questions

It is most important that this Court review the decision of the Circuit Court of Appeals condemning the procedure upon the appointment of the ancillary receiver and holding that appointments so obtained are void for the following chief reasons.

It has long been a common practice to bring about the appointment of ancillary receivers upon the petition of the primary receiver. This is shown by the statement of Circuit Judge Putnam in the case of *Platt* v. *Philadelphia & R. R. Co.,* 54 Fed. 569 (1893).

The fact that it is a common practice is also indicated by *Clark on Receivers,* Second Edition, 1929, which is one of the most recent and thorough discussions upon the subject. At page 434 the author suggests that an application by the petition of the domiciliary receiver is proper and cites the *Bluefields* case *supra.* It is also to

be noted that in the forms compiled in his book of forms, with respect to the appointment of ancillary receivers, the only form is a form of petition by the domiciliary receiver (Form No. 28, page 1646).

If, therefore, the decision of the Circuit Court of Appeals is to stand, it would mean that all such appointments are void and subject to collateral attack, and that all suits which have heretofore been maintained by ancillary receivers thus appointed are subject to be reopened and raked over, and that all titles to properties acquired through ancillary receivers thus appointed are subject to attack, at least within the area of the Second Circuit,—and the same result would follow also in respect to such matters within the area of any of the Circuits, the Courts of which might see fit to follow the decision of the Circuit Court of Appeals in this suit.

The procedure by way of separate ancillary bill is more cumbersome and expensive than by petition of the primary receiver. As shown in our brief hereto annexed there is no reason in the light of proper judicial procedure or from regard to due process or otherwise against the more simple procedure by way of petition of the primary receiver. This form of procedure, as we will also show in our brief hereto annexed, is more in accord with the realities than the other more cumbersome form of procedure. *Furthermore, as shown by the brief hereto annexed, if the views of the Circuit Court of Appeals are to prevail there would be no method of procuring the appointment of an ancillary receiver in this and many other instances where the ends of justice require such appointment.*

As to the merits of the case. Promoters and bankers have been finding immunity in the Courts from accountability in respect to fraudulent promotions arising out of the application by the Courts of the decision of this Court in the case of *Old Dominion Copper Company* v. *Lewisohn, supra,* to situations to which we believe this Court did not intend its decision in the *Old Dominion* case to apply. An example of such a decision is *Ball* v. *Breed,* 294 Fed. 227, (C. C. A. 2d Circuit 1923).

As a further example of this tendency, the District Judge indicated during the course of the oral argument which took place at the close of the trial that, although his sense of justice was shocked by the facts of the case, he might nevertheless be constrained by the *Old Dominion* case and the *Ball* v. *Breed* case and the similar decisions to decide for the defendants; and as indicated by the opinion rendered by the District Judge, he finally felt constrained by the *Old Dominion* decision to refuse judgment for accountability for the $850,000 of moneys which were misappropriated out of the proceeds of the stock (R. p. 336).

It is important, therefore, that this Court should write further upon the subject in order to clarify and to limit the application of the doctrine of the *Old Dominion* case.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals of the Second Circuit, dated the 8th day of January, 1934, and the decree of the United States District Court for the Southern District

of New York, dated the 11th day of May, 1933, should be granted.

GEORGE W. MCCANDLESS,
As Receiver of Duquesne Gas Corporation.

By RALPH ROYALL,
WILLIAM A. MAGEE, and
CLARK MILLER,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

Opinions of the Courts Below

The opinion of the District Court is reported in 4 Fed. Supp. 884 (advance sheets only), and is printed at pages 318-37 of the Record. The opinion of the Circuit Court of Appeals is not yet reported. Printed copies of the opinion of the Circuit Court of Appeals are filed herewith.

Jurisdiction

The jurisdiction to issue the writ is found in Section 240a of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Sec. 347a of Title 28, U. S. C.

Statement of Facts

The statement of facts set out in the foregoing petition is here adopted.

Specification of Errors

(1) The Circuit Court of Appeals erred in reversing the decree of the District Court, dated the 11th day of May, 1933, and in holding that the appointment of the petitioner as ancillary receiver was void and that he did not acquire in any of the proceedings a status to warrant the institution of this suit.

(2) The Circuit Court of Appeals erred in reversing the decree of the District Court dated the 11th day of May, 1933 and in failing to modify the decree by adding to the amount of the judgment the sum of $850,000 with interest and directing that judgment be entered also against defendants Byron Corporation and Chaucer Corporation in the sum of $850,000 with interest.

Argument

I

It was held in the case of *Rust* v. *United Waterworks Co.,* 70 Fed. 129 C. C. A. 8th (1895), that it is proper for a Federal Court to permit a receiver in equity on his own petition to be appointed as ancillary receiver in order to apear in and protect the rights of the receivership estate in a suit pending in a Court of another District or Circuit.

It was held in the case of *Bluefields S. S. Co.* v. *Steele,* 184 Fed. 584, C. C. A. 3rd (1911), that, where the procedure adopted is the filing by a creditor of a separate bill for the appointment of an ancillary receiver in a jurisdiction foreign to the primary appointment, no *subpoena ad respondendum* is necessary,—that the new bill is to be deemed ancillary to the original bill in every sense,—that the parties having been brought before the primary court are deemed to be before the other court for that purpose.

It was held in the case of *Walker* v. *United States Light & Heating Company,* 220 Fed. 393, D. C. S. D., N. Y. (1915), that, in a case where the proceeding for

the ancillary appointment was taken by an ancillary bill, the corporation (the defendant in receivership) could not go behind the consent that it had given to the making of the primary receivership and be heard to resist the appointment of the ancillary receiver.

Who has any direct interest in the propriety of an order appointing an ancillary receiver? The answer is obvious: (1) the corporation, (2) the local creditors within the ancillary jurisdiction, and (3) in an important, though different, sense the primary receiver.

As to the corporation (the defendant in the primary suit whose assets have been taken out of its control and sequestered in the hands of the Court), it is the party chiefly concerned. But as shown by the *Bluefields* case, it, by virtue of its being a party before the Court in the primary proceedings, is deemed to be before the Court in the ancillary proceedings, and, as shown by the decision in the *Walker* case, having consented in the primary proceeding, it is powerless to do anything but acquiesce in the ancillary proceeding.

What conception of the proper exercise of judicial power or of jurisdiction to act is then violated by the appointment of the ancillary receiver upon the petition of the primary one? What purpose would be served, excepting a slavish adherence to a meaningless legal formula, in requiring a creditor to file a new bill against the corporation in the ancillary jurisdiction? Even if judicial process against the corporation for such purpose were required to be served upon the corporation anew,—which under the decision of the *Bluefields* case, it is not,—the Court of the primary jurisdiction, which has the

corporation before it could no doubt, if it saw fit, direct it to appear in that suit for the purpose of thus conforming to an idle formula, or perhaps even to direct it not only to appear but to formally consent to the appointment of the ancillary receiver if that consent were required,—which the decision in the *Walker* case shows that it is not.

Where an awkward form of judicial procedure thus appears to have nothing of substance in it and to consist merely of a hollow formula, there is no underlying judicial conception of power or of jurisdiction which requires it to be followed. This being so, the simple straightforward procedure of petition by the primary receiver is to be preferred.

The only other judicial concern with the appointment of the ancillary receiver and the only thing, indeed, which makes the appointment of an ancillary receiver necessary is the restricted rule of comity set down in the *Booth* case which does not permit the primary receiver to maintain a suit or take possession of the assets of the corporation in the foreign jurisdiction, and this for the reason that the creditors who are citizens of that foreign jurisdiction should have their interests protected in the assets of the corporation within such foreign jurisdiction. But clearly, if the receiver comes before the Court in the foreign jurisdiction and seeks an appointment as ancillary receiver from such Court and is appointed by that Court and put under bond by that Court and made amenable to the further orders of that Court, he is as much the receiver of that Court,—the creditors of that jurisdiction have as much redress against him out of the assets which he may

receive as such ancillary receiver,—as though he were appointed under an ancillary bill instead of by a petition. It is clear, therefore, that such form of procedure is wholly consistent with the rule restricting comity for the purpose of protecting the creditors foreign to the primary jurisdiction.

As to the third party who has an interest in the ancillary proceeding, viz., the primary receiver, the procedure which was adopted here of having it made upon his petition recognizes that interest. The procedure by way of a separate bill of a creditor against the corporation is a form of procedure which fails to take the interest of the primary receiver into consideration. While it is true that the primary receiver has no direct interest of his own in the subject matter, such as the interest of the corporation or the interest of its creditors, nevertheless he is the officer of the Court having the primary jurisdiction of the subject matter to whom the assets of the corporation have been committed and is charged with the duty of administering them. It is a well established rule of procedure that the ancillary jurisdictions look to the primary jurisdiction for the orders and decrees leading to the final fixing of the rights of the interested parties and for sale and distribution, etc. The ancillary courts conform so far as they can, consistently with the protection of local creditors, with the dispositions and determinations made by the Court of primary jurisdiction. This being so, it goes without saying that he who is acting as the chief officer of the Court primarily concerned, viz., the primary receiver, is one who properly should be before the Court in any proceeding for the appointment of an ancillary receiver.

In the last analysis the primary receiver, having regard to the realities, is, indeed, the only person who needs to be heard upon such an application in the ordinary conservation consent receivership. In truth the procedure in the form of another independent suit with a creditor as complainant and the corporation as defendant disregards the one whom the Court is chiefly interested in hearing,—the primary receiver. Of course no Court in the normal situation would think of going forward with the appointment of an ancillary receiver without being well assured that the step had the cognizance of the primary receiver and the Courts usually appoint the primary receiver as ancillary receiver. This goes to show that the proceeding by way of petition by the primary receiver is more in accord with the realities than the procedure by way of another creditors bill.

It is no doubt for the various reasons above set out that such procedure has come to be so broadly adopted.

Cases are cited by the Circuit Court of Appeals to support its conclusion that the appointment of a receiver may be made only upon a separate ancillary bill and may not be made upon a petition by the primary receiver. These cases do not so hold.

The case of *Mercantile Trust Co.* v. *Kanawha & O. Ry. Co.*, 39 Fed. 337, clearly does not decide the question of the validity of an appointment of an ancillary receiver upon the petition of the primary receiver. That case dealt with the question of how an *ex parte* application of the complainant in the original railway foreclosure bill made in another Court should be disposed of. The other cases referred to by the Court below apply this

case to various situations, some of them in rather a distorted manner. The only case cited that deals with a situation arising from the appointment of an ancillary receiver upon the petition of the primary receiver is the case of *Greene* v. *Star Cash & Package Car. Co.,* 99 Fed. 656. But it is clear that the Court based its decision vacating the appointment which it had just made of an ancillary receiver upon the ground that it had been made to appear that the interests of the corporation had not been properly protected upon the primary receivership proceedings. The authority of the *Kanawha* case as applicable to situations such as the one presented by the instant case was directly questioned in the case of *Platt* v. *Philadelphia & R. R Co.,* 54 Fed. 569 (1893).

The opinion of the Circuit Court of Appeals states:

> "*Even if there are assets in the foreign jurisdiction,* the Court there has a right to appoint a receiver only in a pending suit where independent relief is asked." (Italics ours.)

During the course of the argument, one of the Judges of the Circuit Court of Appeals stated that, there being no tangible assets within the Southern District of New York, he did not see how the appointment of an ancillary receiver could be brought about by any form of proceeding. If this is the correct view, it would manifestly follow that a receiver situated as is this petitioner would have no possibility of beginning or prosecuting a suit to hold these fraudulent promoters accountable, unless, by chance, he could find them within the jurisdiction of the Western District of Pennsylvania.

II

The opinion of the Circuit Court of Appeals refers to *Booth* v. *Clark,* 17 How. 322, 15 L. ed. 164 (1855), and several other decisions following it and then states that the procedure here adopted "improperly avoids the rule denying foreign receivers the right to sue in the foreign jurisdiction."

Booth v. *Clark,* which is the basis of the rule that a foreign receiver may not sue beyond the confines of the Court from which he received his appointment, comes to this: That while a Court might, as do the English Courts, extend by comity the right to sue to a receiver appointed in a foreign Court, our Courts should not do so, and this for the reason that the rights of local creditors might be prejudiced by the collection and removal of local assets by such receiver.

This Court has since greatly restricted the scope of this decision. It has quite departed from the decision so far as the reason for it is concerned.

In the case of *Bernheimer* v. *Converse,* 206 U. S. 516, 51 L. ed. 1163 27 S. C. 755 (1906), the Court held that a state statutory receiver, which it characterized as a "quasi-assignee" of the corporation, could as such sue beyond the jurisdiction of the receiver's appointment. Manifestly, the position of the local creditors would be prejudiced to the same extent whether the assets are removed by a receiver who can be characterized as a "quasi-assignee" or by a mere equity receiver. This broad exception has been frequently applied to quite a variety of cases.

Another exception was ingrafted by this Court by its decision in *Grant* v. *Leach & Co.*, 280 U. S. 351, 74 L. ed. 470 50 S. C. 107 (1930), in which this Court permitted an equity receiver appointed by one of the Federal District Courts to sue in another Federal District Court located, however, within the same State, stating at page 362 that "the Federal Court in the same State cannot rightly be considered a court of foreign jurisdiction within the meaning of the general rule."

The case of *Converse* v. *Hamilton*, 224 U. S. 243, 56 L. ed. 749 32 S. C. 415 (1911), carries the limitation made by *Bernheimer* v. *Converse* to the point that the denial by the Courts of one State of the right of suit by a receiver appointed by the Courts of a sister State (which latter Courts have determined that such a receiver stands in the position of an assignee) is a violation of the full faith and credit clause of the Constitution.

The Courts of several States have seen fit not to follow the rule of *Booth* v. *Clark*, but have determined, notwithstanding that decision, to extend comity to foreign equity receivers for the purpose of suing within their States.*

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*New York—*Mabon* v. *Ongley Electric Co.*, 156 N. Y. 196; *Union Guardian Trust Co.* v. *Broadway National Bank*, 138 Misc. 16.

The Court in the last cited case referred to the following decisions of other states which grant by comity the right to foreign equity receivers to sue:

Ala.— *Boulware* v. *Davis*, 90 Ala. 207;
Ill.— *Sercomb* v. *Catlin*, 128 Ill. 556;
Ind.— *Metzner* v. *Bauer*, 98 Ind. 425;
Me.— *Hunt* v. *Columbian Ins. Co.*, 55 Me. 290;
Md.— *Castleman* v. *Templeman*, 87 Md. 546;
Minn.— *Stevens* v. *Tilden*, 122 Minn. 250;

Most of the other States, while following the general rule of *Booth* v. *Clark*, have applied the limitations suggested by the *Bernheimer* decision.

In 1855, when the decision in *Booth* v. *Clark* was made, the question as to the policy then suitable was quite a different one than is presented by the modern day relations existing between our various States. The question of whether the Federal Courts should as a matter of comity recognize a receiver appointed by a Court in another State or by a Federal Court in another District is purely a question of policy as distinguished from a question of power, jurisdiction or constitutional rights. It is far from clear that this question of policy should now be viewed in the same light as it was in 1854. When consideration has also been given to the facts that this Court has by its decision in the case of *Bernheimer* v. *Converse* largely emasculated the rule and completely departed from it so far as the reason for it is concerned and that many of the states have departed from the federal view as to this question of policy, the question arises whether the time has not now come to look upon the rule as obsolete and for this Court so to declare.

N. J.— *Hurd* v. *City of Elizabeth*, 41 N. J. L. 1;
Ohio— *Bank* v. *McLeod*, 38 Ohio St. 174;
Tenn.— *Hardee* v. *Wilson*, 129 Tenn. 511;
Wisc.— *Parker* v. *Stoughton Mill Co.*, 91 Wisc. 174;
England—*Alivon* v. *Furnival*, 1 Cr., M. & R. 277.

The Courts of the following other states adopt the same view:

N. C.— *Van Kempen* v. *Latham*, 195 N. C. 389;
Pa.— *Bagby et al.* v. *Atlantic, Mississippi & Ohio R. R.*, 86 Pa. 291;
Solis v. *Blank*, 199 Pa. 600.
S. D.— *Cole* v. *Sassenbeery*, 230 Nev. 22;
W. Va.—*State* v. *U. S. Fidelity, etc. Co.*, 81 W. Va. 184.

However that may be, the procedure here adopted for the appointment of the ancillary receiver does not, as the Circuit Court of Appeals says, avoid the rule. On the contrary, the procedure was adopted in recognition of the rule and in full compliance with it. It was for this that this petitioner applied for and obtained his ancillary appointment and furnished bond for the protection of local creditors.

III

The Circuit Court of Appeals, after setting forth a brief statement of the facts, rather indicates again a leaning such as their decision in the case of *Ball* v. *Breed,* indicates, for the Court goes on and says:

> "Whether this was a misappropriation of the funds *or a legitimate profit* we need not now decide." (Italics ours.)

There is no need to do more than refer the Court to the facts as carefully summarized in Judge Knox's opinion to present a complete demonstration that there is here presented a shocking case of fraudulent misappropriation.

It is an unfortunate thing that the doctrine of the *Old Dominion* case should be interpreted as having the effect of legitimatizing transactions which from the standpoint of plain justice and good morals are so shockingly wrong.

Conclusion

It is submitted that it is most important that this Court should decide and set at rest the question as to the validity of appointments of ancillary receivers for the purpose of bringing suit in cases where such appointments are brought about upon the petition of a primary receiver, and for the Court also to give consideration to the wisdom of continuing a rule of policy laid down in *Booth* v. *Clark* under which comity has been denied to equity receivers to sue in a jurisdiction beyond that of their appointment.

It is also submitted that it is most important that the Court review the application of its decision of *Old Dominion Copper Company* v. *Lewisohn* in respect of situations such as the instant one in which fraudulent promoters or bankers claim,—under what is a supposedly correct construction of that case,—immunity from accountability for fraudulent misappropriations.

Respectfully submitted,

RALPH ROYALL,
WILLIAM A. MAGEE, and
CLARK MILLER,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1934

No. 11

GEORGE W. McCANDLESS, as Receiver of Duquesne Gas Corporation,

Petitioner,

against

MAXIME H. FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER GEORGE W. McCANDLESS AS RECEIVER OF DUQUESNE GAS CORPORATION

RALPH ROYALL,
WILLIAM A. MAGEE,
CLARK MILLER,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1934

No. 11

GEORGE W. McCANDLESS, as Receiver of DUQUESNE GAS CORPORATION,

Petitioner,

against

MAXIME H. FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER GEORGE W. McCANDLESS AS RECEIVER OF DUQUESNE GAS CORPORATION

This case comes before the Court on a writ of certiorari granted to the United States Circuit Court of Appeals, Second Circuit, issued April 30, 1934 (78 L. Ed. 863) (not officially reported).

The judgments and decrees below are the judgment of the United States Circuit Court of Appeals, Second Circuit, filed January 15, 1934 (R. 74), reversing the decree of the United States District Court for the Southern District of New York, dated the 11th day of May, 1933, which awarded a judgment to the complainant

McCandless as receiver in the sum of $1,834,640.08 (R. 67).

OPINIONS BELOW

The opinion of the District Court is printed at pages 52-66 of the Record and is reported in 4 Fed. Supp. 884 (advance sheets only). The opinion of the Circuit Court of Appeals is printed at pages 68-73 of the Record and is reported at 68 Fed. (2nd) 925.

JURISDICTION

The jurisdiction arises from the granting of the writ of certiorari herein pursuant to Section 240(a) of the Judicial Code as amended by the Act of 1925.

STATEMENT

This is a suit brought by the petitioner in his capacity of ancillary receiver of Duquesne Gas Corporation, appointed as such in the District Court of the United States for the Southern District of New York (R. 3-12). After a trial before United States District Court Judge Knox, a decree was made awarding judgment to the complainant against the defendants Maxime H. Furlaud and the Kingston Corporation in the sum of $1,834,640.08 and dismissing the complaint as to the defendants Byron Corporation and Chaucer Corporation (R. 67-8). The defendant Carlos Reuter was not served with process and did not appear (R. 1).

The defendants Maxime H. Furlaud and Kingston Corporation appealed from such decree to the Circuit Court of Appeals, Second Circuit, and the complainant

took a cross appeal claiming that judgment should have been awarded against each of the defendants Byron Corporation and Chaucer Corporation, and also that the judgment against the defendants Maxime H. Furlaud and Kingston Corporation should be increased.

Upon the appeal the defendants raised the question of the validity of the appointment of the complainant as ancillary receiver. They claimed that the appointment of the complainant as ancillary receiver in the District Court for the Southern District of New York was void and that such appointment could be collaterally attacked and that the judgment which had been granted in favor of the complainant as such ancillary receiver should, therefore, be reversed. The Circuit Court of Appeals adopted this view and reversed the judgment of the District Court but expressly refrained from deciding the merits.

Since the decision of this Court granting the writ of certiorari limited it to the questions pertaining to the right of the complainant to maintain the suit, we will refrain from detailing the facts. Suffice it to say that suit was brought by the ancillary receiver in behalf of the corporation and of its creditors against the defendants as fraudulent bankers and promoters of the corporation for an accounting, in that, while acting in a fiduciary capacity to the corporation, they misappropriated a large part of the proceeds of the public issue and sale by them of the bonds and notes of the corporation. A further statement of the nature of the suit appears sufficiently, we believe, for present purposes in the opinion of Judge Knox (R. 52-66).

The Circuit Court of Appeals based its reversal of the judgment wholly upon the proposition that the appointment of the petitioner as ancillary receiver was void

and could be collaterally attacked. The sole reason for this determination was that such appointment was made upon the application of the petitioner herein as the primary receiver, acting under his appointment as such in the United States District Court for the Western District of Pennsylvania, rather than upon a separate ancillary bill by a creditor of the corporation against the corporation in the United States District Court for the Southern District of New York.

The complainant McCandless was duly appointed as primary or domiciliary receiver of Duquesne Gas Corporation in the District Court of the Western District of Pennsylvania in which the Duquesne Gas Corporation was domiciled and within the confines of which all of its tangible property was situated. Such receivership was granted in two suits: one a suit by a stockholder, and the other by the trustee under the mortgage securing the bonds. These suits were consolidated *and the corporation then appeared and consented to a decree for the appointment of a receiver.* The complainant was thereupon appointed such receiver and duly qualified and has ever since been acting as such. The decree in the primary proceedings was in the usual form, sequestering all of the assets of the corporation (R. 17-52). The validity or propriety of the primary receivership proceedings has not been questioned.

As the defendants who had to be sued were to be found only in New York, it was necessary under the doctrine established by the decision of this Court in the case of *Booth* v. *Clark,* 17 How. 322, 58 U. S. 322, 15 L. Ed. 164 (1855) that an ancillary receiver be appointed in the Southern District of New York in order there to maintain the suit. Therefore, the petitioner filed his petition in the Southern District of New York, setting forth his

appointment as primary receiver and attaching thereto exemplified copies of the proceedings in the United States District Court of the Western District of Pennsylvania relating to his appointment as primary receiver and asking for the appointment of an ancillary receiver. The petition alleged the existence of a cause of action against the New York defendants (R. 17-19).

The order of the District Court of the Southern District of New York appointing the petitioner ancillary receiver, dated March 23, 1932, is printed at pages 50-51 of the Record, and recites that it is made,

> "Upon the annexed bill of complaint filed in the above entitled suit in the United States District Court for the Western District of Pennsylvania, and upon the answer of the defendant therein to said amended bill of complaint, *and upon the per curiam decree therein of the United States District Court for the Western District of Pennsylvania, dated the 19th day of January, 1932, appointing George W. McCandless receiver of the assets,* lands, tenements and hereditaments of the defendant Duquesne Gas Corporation, and all of its property real and personal, *including choses in action,* * * *"

This order authorized the beginning of the instant suit, provided for a bond of $25,000 and further "that upon any moneys or funds coming into his hands said ancillary receiver shall immediately report the fact to the Court and submit to the Court the question of an increase of this bond" (R. 51-52).

The record does not disclose the existence of any tangible property of Duquesne Gas Corporation within the Southern District of New York, nor is the existence of any such property known. The case was submitted for

decision in the Circuit Court of Appeals upon the statement made by counsel that there was no tangible property in the Southern District of New York.

SPECIFICATION OF ERROR

The Circuit Court of Appeals erred in reversing the decree of the District Court dated the 11th day of May, 1933 and in holding that the appointment of the petitioner as ancillary receiver was void and could be collaterally attacked.

ARGUMENT

POINT I

THE APPOINTMENT OF THE PETITIONER AS ANCILLARY RECEIVER IS VALID AND HE HAS THE RIGHT AS SUCH TO MAINTAIN THE SUIT. THE APPOINTMENT CANNOT BE COLLATERALLY ATTACKED.

The opinion of the Court below contains the following statement of its reason for declaring petitioner's appointment as ancillary receiver void:

> "Thus, upon the petition alone of a foreign federal receiver, an ancillary receiver is appointed, where no bill had been filed in the jurisdiction by any party aggrieved praying for such relief. No process was issued in this jurisdiction and there has been no appearance or answer filed by the corporation within the district (R. 72). * * *
>
> "Ancillary proceedings are independent suits and there must be a plaintiff and a defendant and the first must be one who claims injury committed

> by the defendant. * * * The appointment of the plaintiff as ancillary receiver was void, and he did not acquire, in any of the proceedings, a status to warrant the institution of this suit" (R. 73).

A conclusion opposite to that reached by the Court below has been arrived at by the Circuit Court of Appeals in the other Circuits in which the question has come up for decision, viz. the Third, Fourth, Eighth and Ninth Circuits. See *Mitchell* v. *Maurer,* 69 Fed. (2d) 233 (C. C. A. 9th, 1934); *Ward* v. *Foulkrod,* 264 Fed. 627 (C. C. A. 3rd, 1920); *Coal & Iron Ry. Co.* v. *Reherd,* 204 Fed. 859, 882 (C. C. A. 4th, 1913); *Rust* v. *United Water Works Co.,* 70 Fed. 129 (C. C. A. 8th, 1895).

In the *Mitchell* case, a California state receiver, who had been appointed such on the same day as the appointment of ancillary receivers in a Federal District Court of California, made a direct challenge of the validity of the order appointing the ancillary receivers. The appointment challenged was made upon a petition of the primary receivers who had been appointed equity receivers in a suit in Delaware. The validity of the appointment of the ancillary receivers was sustained. At pages 235 and 236, the Circuit Court of Appeals reviews the cases of *Booth* v. *Clark,* and the other decisions following it, including this Court's decisions in *Great Western Mining & Mfg. Co.* v. *Harris,* 198 U. S. 561, 25 S. Ct. 770, 49 L. Ed. 380, and *Sterrett* v. *Second National Bank,* 248 U. S. 73, 39 S. Ct. 27, 63 L. Ed. 135. After emphasizing that the reason for the rule of *Booth* v. *Clark* is the protection of local creditors, the Circuit Court of Appeals then quotes from this Court's opinion in the *Sterrett* case referring to the practice under the rule of *Booth* v. *Clark,* where this Court says:

> "It (such practice) permits an application for an ancillary receivership in a foreign jurisdiction where the local assets may be recovered and, if necessary, administered."

The opinion of the Circuit Court of Appeals then goes on and says:

> "Indeed, specific recognition of the right of the primary receiver to ask for the appointment of an ancillary receiver in a foreign jurisdiction is contained in the case of *Ward* v. *Foulkrod* * * *."

The Court also refers to *Rust* v. *United Waterworks Co.* as authority for such procedure and then states at page 237:

> "Assuredly such a petition does not come within the strictures of the Supreme Court in the *Great Western* case, *supra,* as to the disregard of 'rights of local creditors'."

In the *Ward* case the Court commented upon the federal rule that an equity receiver may not sue beyond the jurisdiction of the Court appointing him. The Court propounded the question "What then is to be done?" and then proceeded to point out that the filing of a petition by the primary receiver for the appointment of an ancillary receiver was the proper procedure and said:

> "When the prayer of such a petition has been granted and ancillary receivers have been appointed, all rights, those of the domiciliary court and of the foreign court, and of all stockholders and creditors of the corporation in both jurisdictions, will fall into their proper places and will be duly cared for and protected in the orderly administration of the estate" (p. 637).

In the *Coal & Iron Ry. Co.* case, the Circuit Court of Appeals of the 4th Circuit held that the appointment of an ancillary receiver upon the petition of a primary receiver is a proper practice. After citing *Booth* v. *Clark, Great Western Mining & Mfg. Co.* v. *Harris* and several of the other similar decisions of this court the court said at page 882:

> "It seems to be settled, therefore, that this receiver, who was appointed in a Virginia court, was not authorized in the outset to institute his action in the United States Court in the Northern District of West Virginia; but the plaintiff undoubtedly, from his subsequent action, undertook to cure this defect by going into Randolph County, W. Va., after the suit had been begun, and filing an ancillary bill, under which an order ratifying his appointment as receiver was made, * * *.
>
> "The question then presented is as to whether this proceeding, taken after the suit had been actually instituted, would have the effect for which it was intended. It occurs to us that in this situation the position of the defendant becomes one of extreme technicality. *Undoubtedly, if the plaintiff had filed his ancillary bill in the state court of Randolph County, W. Va., and his appointment as receiver had been ratified, and authority given to bring the suit, the proceeding herein would have been regular and the question of jurisdiction eliminated.*
>
> * * *
>
> "Under the circumstances of this case, after all the facts have been fully considered by a court and a jury, consuming no doubt much time and a large expenditure of money, we are not inclined, and it would in our opinion be unwarranted, to respond to the defendant's position, which involves, as we have said, a mere technicality based

> upon an irregular proceeding, and such action on our part would not only greatly militate against the interests of the parties to this action, but would also tend to unnecessarily retard the administration of justice." (Italics supplied.)

In the *Rust* case, it was held that it is proper for a Federal Court, in which a suit is pending, to permit a foreign equity receiver to appear therein and file a petition to be appointed ancillary receiver in order to protect the rights of the receivership estate in such suit, and for the Court upon such petition to appoint him as such ancillary receiver and to permit him as such to come in and defend.

The Court said at page 133:

> "The question before the court below was not whether or not, without its order or permission, the plaintiff in error had the power or the authority to defend the action against the American Waterworks Company, but whether or not, upon the facts disclosed by his petition and the answer to it, that court ought to give him permission and authority so to do. *It goes without saying that the court below had the power, upon the presentation to it of the decree of the court of chancery of the state of New Jersey appointing the plaintiff in error the receiver of the property of this insolvent corporation, and the trustee for its creditors and stockholders, to appoint him a receiver and trustee, with the same powers, in the district of Colorado, and to authorize him to sue for, and to defend suits against, the waterworks company in that district in the name of the corporation, or in his own name.*" (Italics supplied.)

In the case of *Shinney* v. *North American Savings L. & B. Co.*, 97 Fed. 9 (Circuit Court District of Utah,

1899), a Chancery receiver appointed by a State Court in another state was upon his own petition appointed ancillary receiver in the United States Court for the Utah District. This was done upon the authority of the *Rust* case.

In the case of *Seested* v. *Bonfils,* D. C. Colo., 1929, 33 Fed. (2d) 185, a foreign equity receiver of a foreign corporation brought a bill asking to be appointed ancillary receiver of the corporation and as such be permitted to maintain the suit. The practice adopted was to seek the appointment as ancillary receiver as a step in and a part of the suit which was for the recovery of corporate funds fraudulently diverted. The Court approved this procedure relying on the *Rust, Ward* and *Shinney* cases.

Who has any direct interest in the propriety of an order appointing an ancillary receiver? The answer is obvious: (1) the defendant corporation, (2) the local creditors within the ancillary jurisdiction, and (3) in an important, though different sense, the primary receiver.

As to the corporation: it was held in the case of *Bluefields S. S. Co.* v. *Steele,* 184 Fed. 584, C. C. A. 3rd Cir. (1911) that, where the procedure adopted is the filing by a creditor of a separate bill for the appointment of an ancillary receiver in a jurisdiction foreign to the primary appointment, no *subpoena ad respondendum* is necessary,—that the new bill is to be deemed ancillary to the original bill in every sense,—that the parties having been brought before the primary court are to be deemed to be before the ancillary court for that purpose. The Court said at page 587:

> "In any such case the jurisdiction is analogous to that of a court to appoint a receiver on a proper bill in a suit ancillary to another suit or action pending in the same court. In a suit strictly

> ancillary to another suit pending in the same court, no *subpoena ad respondendum* is necessary. The parties are already in court. The service of a rule or of notice is all that is required to enable the court to proceed with the ancillary suit. So, where a defendant has been regularly brought into court in an original suit, and a receiver of his property has been appointed in that suit, another court, whose jurisdiction is invoked in aid of the original receivership, may proceed on the service of a rule or notice merely."

It was held in the case of *Walker* v. *United States Lighting & Heating Company,* 220 Fed. 393, D. C. S. D., N. Y. (1915) that, in a case where the proceeding for the ancillary appointment was taken by an ancillary bill, the corporation (the defendant in receivership) could not go behind the consent that it had given to the making of the primary receivership and be heard to resist the appointment of the ancillary receiver. In a word, that there is nothing to litigate in such an ancillary suit.

The corporation (the defendant in the primary suit whose assets have been taken out of its control and sequestered in the hands of the Court) is the party chiefly concerned. But as shown by the *Bluefields* case, it, by virtue of its being a party before the Court in the primary proceedings, is deemed to be before the Court in the ancillary proceedings and, as shown by the decision in the *Walker* case, having consented in the primary proceeding, it is powerless to do anything but acquiesce in the ancillary proceeding.

As to the local creditors, manifestly their interests are equally well protected however the appointment of the ancillary receiver comes about so long as such ancillary receiver is amenable to the further orders and directions of the Court appointing him and is under bond.

An ancillary receiver appointed as was the receiver in the instant case is fully accountable in every sense to local creditors, as much so as would be an ancillary receiver appointed upon a separate bill.

As to the third party who has an interest in the proceedings, viz., the primary receiver, the procedure of having it made upon his petition recognizes that interest. On the other hand, where a separate bill of a creditor against the corporation is the form of procedure adopted, it fails to take the interest of the primary receiver into consideration. While it is true that the primary receiver has no direct interest of his own, such as the interest of the corporation or of its creditors, nevertheless he is the officer of the Court having the primary jurisdiction of the subject matter to whom the assets of the corporation have been committed and is charged with the duty of administering them. It is a well established rule of procedure that the ancillary jurisdictions look to the primary jurisdiction for the orders and decrees leading to the final fixing of the rights of the interested parties and for sale, distribution, etc. The ancillary courts conform so far as they can, consistently with the protection of local creditors, with the dispensations and determinations made by the Court of primary jurisdiction. This being so, it goes without saying that he who is acting as the chief officer of the Court primarily concerned, viz., the primary receiver, is one who properly should be before the Court in any proceeding for the appointment of an ancillary receiver.

Having regard to the realities, the primary receiver is, indeed, the only person who needs to be heard upon such an application in the ordinary conservation consent receivership such as this. In truth, the procedure in the form of another independent suit with

a creditor as complainant and the corporation as defendant disregards the one whom the Court is chiefly interested in hearing,—the primary receiver. Of course no Court in the normal situation would see fit to go forward with the appointment of an ancillary receiver without being well assured that the step had the cognizance of the primary receiver and the Courts usually appoint the primary receiver as ancillary receiver, as was done in the instant case. This goes to show that the proceeding by way of petition by the primary receiver is more in accord with the realities than the procedure by way of another creditor's bill.

What conception of the proper exercise of judicial power or of jurisdiction to act is then violated by the appointment of an ancillary receiver upon the petition of the primary one? What purpose would be served, excepting a slavish adherence to a meaningless legal formula, in requiring a creditor to file a new bill against the corporation in the ancillary jurisdiction? Even if judicial process against the corporation for such purpose were required to be served upon the corporation anew,—which under the decision of the *Bluefields* case, it is not,—the Court of the primary jurisdiction, which has the corporation before it could no doubt, if it saw fit, direct it to appear in that suit for the purpose of thus conforming to an idle formula, or even to direct it not only to appear but to formally consent to the appointment of the ancillary receiver if that consent anew were required, —which the decision in the *Walker* case shows that it is not.

Where an awkward form of judicial procedure thus appears to have nothing of substance in it and to consist merely of a hollow formula, there is no underlying judicial conception of power or of jurisdiction which requires

it to be followed. This being so, the simple straightforward procedure of petition by the primary receiver is to be preferred.

The Circuit Court of Appeals cites several cases as authority for its holding that the appointment of an ancillary receiver cannot be made by way of petition by the primary receiver. The only one of these cases which clearly appears to deal with a situation arising from the appointment of an ancillary receiver upon the petition of a primary receiver is that of *Greene* v. *Star Cash & Package Car Co.*, 99 Fed. 656. But it is plain that the Court based its decision vacating the appointment which it had just made of an ancillary receiver on the ground that it had been made to appear that the interests of the corporation had not been properly protected in the primary receivership proceedings.

Although in the case of *In re Brant*, 96 Fed. 257, the Court seemed to condemn the appointment of an ancillary receiver upon an *ex parte* petition, it does not appear from the report how the appointment was made; it does not appear that the petition was presented by the primary receiver; nor does it appear whether the original receivership was with the consent of the debtor.

The case of *Fairview, etc. Co.* v. *Ulrich*, 192 Fed. 894 (C. C. A. 7th, 1911), cites with approval the *Brant* case. But it is clear that the *ex parte* application for the appointment of an ancillary receiver was not made by the primary receiver but merely by a creditor, and the record fails to disclose that the primary receivership was brought about upon the corporation's consent.

The authorities relied on by the Circuit Court of Appeals and by the respondents are at most some authority for the proposition that the bringing about of the appointment of an ancillary receiver upon the *ex parte*

application of *a creditor* in cases *where the corporation has not consented to the primary receivership* is irregular. Even if they can be construed as meaning more than this,—which we believe is not the case,—they are then clearly out of line with the weight of authority upon the question here involved.

The case of *Mercantile Trust Co.* v. *Kanawha & O. Ry. Co.*, 39 Fed. 337, which seems to have been the basis for whatever doubt has since been entertained as to the propriety of the appointment of an ancillary receiver upon the petition of a primary receiver, is not authority for such a holding, although this case was cited by the Circuit Court of Appeals, as well as by the Courts in the other cases referred to by the Circuit Court of Appeals. In the *Kanawha* case, the complainant (trustee under the mortgage) in a railway foreclosure case, in which the property of the railway was in more than one state, and who had brought about the appointment of a receiver in a Federal Court in Ohio, then made an *ex parte* application in a Federal Court in West Virginia merely asking that that Court decree that the West Virginia property be held amenable to the orders thereafter to be made by the Ohio Court, and the Court refused such relief.

In the case of *Platt* v. *Philadelphia & R. R. Co., et al.*, 54 Fed. 569 (1893), Circuit Judge Putnam referred to the *Kanawha* case and refused to follow it as authority for the proposition that it was improper to bring about the appointment of an ancillary receiver upon the petition of the primary one. The Court said:

> " * * * in other districts such bills have been frequently entertained and acted upon, generally, if not always, on *ex parte* proceedings, and without argument. The same has been done *ex parte*

on several occasions in this court. We will at present follow this practice * * *."

This leads to a practical consideration of serious import. As we have seen from the cases cited at the beginning of this point there is very considerable authority in several of the circuits countenancing and approving the appointment of an ancillary receiver upon the petition of a primary receiver. On the other hand, there is no authority other than the decision of the Circuit Court of Appeals now under review which directly condemns the procedure.

We should point out at this place that *Clark on Receivers,* Second Ed., 1929, which is one of the most thorough texts, at Section 318, pages 434-5, refers to several of the cases cited above and suggests that the appointment of an ancillary receiver upon the petition of the primary receiver is proper. It is also to be noted that the only form contained in the compilation of forms attached in this book and relating to the appointment of ancillary receivers is a form of petition by the primary receiver.

It cannot, therefore, be doubted that this form of procedure has been embraced time and time again and that many of the appointments of ancillary receivers, throughout the United States have been made upon petitions presented by the primary receiver, as was done in the instant case.

If, therefore, the decision of the Circuit Court of Appeals be affirmed by this Court, it would mean that all such appointments are void and subject to collateral attack, and that all suits which have heretofore been maintained by ancillary receivers thus appointed are subject to be reopened and raked over, and that all titles to properties acquired through ancillary receivers thus

appointed are subject to attack. It cannot be doubted that the rights of many, in subject matters of large importance, would thus be disturbed or destroyed. Such a result should be avoided and can be without injury to precedent or principle.

There is still a further practical consideration of grave importance which is raised by the opinion of the Circuit Court of Appeals. That opinion states (R. 73):

> *"Even if there are assets in the foreign jurisdiction,* the Court there has a right to appoint a receiver only in a pending suit where independent relief is asked." (Italics supplied.)

During the course of the argument, one of the Judges of the Circuit Court of Appeals stated that, there being no tangible assets within the Southern District of New York, he did not see how the appointment of an ancillary receiver could be brought about by any form of procedure. This, certainly, is the result suggested by the language of the opinion just quoted. If this is the correct view, it would have to follow that a receiver situated as is the petitioner would have no possibility of beginning or prosecuting a suit to hold these fraudulent promoters accountable, unless by chance, he could find them within the jurisdiction of the Western District of Pennsylvania; that the Courts in such a situation would be entirely helpless by any form of procedure to bring about the appointment of an ancillary receiver in order to make possible the prosecution of suits which were necessary for the proper protection of the receivership estate and of the interests of the creditors.

The opinion of the Circuit Court of Appeals refers to *Booth* v. *Clark,* and several other decisions following it and then states (R. 73):

> "To permit a foreign receiver to obtain an ancillary appointment, on an *ex parte* application improperly avoids the rule denying foreign receivers the right to sue in the foreign jurisdiction."

But the procedure here adopted for the appointment of the ancillary receiver does not, as the Circuit Court of Appeals says, avoid the rule. On the contrary, the procedure was adopted in recognition of the rule and in full compliance with it. It was for this that the receiver applied for and obtained his ancillary appointment and furnished bond for the protection of local creditors.

The question finally reduces itself to what this Court should require to be done by way of compliance with its rule of *Booth* v. *Clark,* and the correct decision of this will, we believe, be affected by a consideration of the nature of and the reasons for the rule as disclosed by that decision as well as by the history of its further development.

What is the rule of *Booth* v. *Clark,* which the Court below says was improperly avoided? It is a rule for the Federal Courts announced in 1855 in that case that the principle of comity should not be applied so as to permit a foreign receiver to sue. This Court, after discussing the decisions of the English Courts and the situation in respect of the other European nations and finding that, generally, foreign receivers are permitted to sue as a matter of international comity, said at page 336:

> "It may now be said to be the rule of comity between the nations of Europe; but it has never been sanctioned in the Courts of the United States, nor in the judicial tribunals of the States

> of our nation, so far as we know, and we know that it has been repeatedly refused in the latter."

The opinion concludes that the general rule of comity which has been internationally accepted ought not to be adopted for this country, even as between our several states. The reason given is that to permit a receiver of one state to sue in another might be prejudicial to the interests of the local creditors of the state where the receiver would thus be permitted to sue. The decision has been frequently followed by this Court.

However, this court has not seen fit to extend the rule. On the contrary, it has indicated an intention to limit the effect of its decision.

In the case of *Bernheimer* v. *Converse,* 206 U. S. 516, 51 L. Ed. 1163, 27 S. C. 755 (1906), a far-reaching exception was established,—and has since been often applied,—that a state statutory receiver such as may be characterized as a "quasi-assignee" of the corporation could as such sue beyond the jurisdiction of the receiver's appointment. This may be said to be inconsistent with the reason for the rule. The position of local creditors would be prejudiced to the same extent whether the assets were removed by a foreign receiver who may be characterized as a "quasi-assignee" or by a mere equity receiver.

In the case of *Converse* v. *Hamilton,* 224 U. S. 243, 56 L. Ed. 749, 32 S. C. 415 (1911), the Court applied the full faith and credit clause of the Constitution and compelled a state, against that state's views of its own public policy, to permit the foreign receiver to sue where such receiver may be characterized as a "quasi-assignee" of the corporation.

That the rule of *Booth* v. *Clark,* concerns only a question of *state* comity is demonstrated in more than one

way. In the case of *Grant* v. *Leach & Co.,* 280 U. S. 351, 74 L. Ed. 470, 50 S. C. 107 (1930), this Court permitted a federal equity receiver appointed in one district of Ohio to maintain a suit beyond the jurisdiction of that Court, namely in another district of Ohio, and this apparently for the simple reason that there was no question of state comity involved. The Court said:

> "We think that under these circumstances the Federal Court in the same state cannot rightly be considered a court of foreign jurisdiction within the meaning of the general rule, and that there is no substantial grounds for extending that rule, as hitherto applied, so as to bring this case within its terms" (p. 362).

Again this Court, in *Finney* v. *Guy,* 189 U. S. 335, 47 L. Ed. 839, 23 Sup. Ct. Rep. 558, said:

> "Whether, aside from the federal considerations just discussed, the Wisconsin court should have permitted this action to be maintained because of the principle of comity between the states, is a question exclusively for the courts of that state to decide" (p. 345).

This language was quoted with approval in the decision of *Converse* v. *Hamilton, supra.*

Moreover, the rule of *Booth* v. *Clark* is not followed by most of our states. In an overwhelming majority of the states in which the question has been judicially considered, the rule of *Booth* v. *Clark* has been rejected and a foreign receiver is allowed to sue on principles of comity.*

---

*In the following states a foreign equity receiver is permitted to sue:

ALABAMA

Boulware v. *Davis,* 90 Ala. 207, 8 So. 84, 1889.

While generally the comparatively few states, which have adopted the federal view, also follow the broad exception engrafted upon it by the *Bernheimer* decision, it is clear that, if they did not, this Court would, under the *Hamilton* decision, compel them to do so.

CALIFORNIA
Wright v. *Phillips*, 60 Calif. Appeals 578, 213 Pac. 288, 1923;
Ward v. *Pacific Mutual Life Insurance Company*, 135 Calif. 235, 67 Pac. 124, 1901.

FLORIDA
Richardson v. *Southern Florida Mortgage Co.*, 102 Fla. 313, 1931.

INDIANA
Metzner v. *Bauer*, 98 Ind. 425, 1884.

KENTUCKY
Johnston v. *Rogers*, 19 Ky. L. R. 1272, 43 S. W. 234, 1897;
Hallam v. *Ashford*, 24 Ky. L. R. 870, 70 S. W. 197, 1902.

MICHIGAN
Pontiac Trust Company v. *Newell*, 266 Mich. 490; 254 N. W. 178, 1934;
Baldwin v. *Circuit Judge*, 101 Mich. 119, 1894.

MINNESOTA
Comstock v. *Frederickson*, 51 Minn. 350, 53 N. W. 713, 1892;
Stevens v. *Tilven*, 122 Minn. 250, 1913.

MISSOURI
Weil v. *Bank of Burr Oak*, 76 Mo. App. 34, 1898;
Robertson v. *Stead*, 135 Mo. 135, 1896.

NEW HAMPSHIRE
Tompkins v. *Blakey*, 70 N. H. 584, 1900.

NEW JERSEY
Hurd v. *City of Elizabeth*, 41 N. J. Law 1, 1879.

NEW YORK
Hoyt v. *Thompson*, 5 N. Y. 320, 1851;
Mabon v. *Ongley Electric Co.*, 156 N. Y. 196, 1898;
Union Guardian Trust Co. v. *Broadway National Bank*, 138 Misc. 16, 1930.

NORTH CAROLINA
Van Kempen v. *Latham*, 195 N. C. 389, 1928.

OHIO
Bank v. *McLeod*, 38 Ohio State, 174, 1882;
State v. *Crabbe*, 114 Ohio State, 504, 151 N. E. 755, 1926.

PENNSYLVANIA
Bagby v. *Atlantic, Mississippi & Ohio Railroad*, 86 Penn. State, 291, 1878.

SOUTH CAROLINA
Wilson v. *Keels*, 54 S. C. 545, 1898.

SOUTH DAKOTA
Small v. *Smith*, 14 S. D. 621, 86 N. W. 649, 1901;
Cole v. *Sassenberry*, 56 S. D. 595, 230 N. W. 22, 1930.

TENNESSEE
Hardee v. *Wilson*, 129 Tenn. 511, 1914.

In the face of such an overwhelming trend of judicial opinion, the Courts, we submit, should not by insisting upon hollow technical formality enlarge the sphere in which the rule of *Booth* v. *Clark* has practical

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VERMONT
Insurance Company v. *Wright*, 55 Vermont 526, 1883.

WEST VIRGINIA
Shull v. *Fidelity & Guaranty Company*, 81 West Va. 184, 1917;
Grogan v. *Egbert*, 44 West Va. 75, 1897.

WISCONSIN
Parker v. *Stoughton Mill Company*, 91 Wisc. 174, 1895.

WYOMING
Continental Oil Co. v. *American Co-op. Ass'n*, 31 Wyoming 433, 228 Pac. 503, 1924.

The law of England is in accord.

Alvon v. *Furnival*, 1 Cr. M. & R. 277, 149 English Reports 1085, 1834;
McAuley v. *Guaranty Trust Company of New York*, 1927 W. N. 308, 44 Times Reports 99.

In the following states there is no direct holding on the question, but the courts have indicated their approval of the majority view allowing a foreign equity receiver to sue:

ARKANSAS
Choctaw Coal Company v. *Williams-Echols Dry Goods Company*, 75 Ark. 365, 87 S. W. 632, 1905.

ILLINOIS
Sercomb v. *Catlin*, 128 Ill. 556, 1889;
Patterson v. *Lynde*, 112 Ill. 196, 1884.

KANSAS
Winans v. *Manufacturing Co.*, 48 Kansas 777, 30 Pac. 163, 1892.

MAINE
Hunt v. *Columbian Insurance Co.*, 55 Me. 290, 1867.

MARYLAND
Castleman v. *Templeman*, 87 Md. 546, 1898.

NEBRASKA
Ten Broeck v. *Caldwell*, 95 Nebr. 464, 145 N. W. 980, 1914.

OREGON
Eagan v. *North America Loan Company*, 45 Ore. 131, 76 Pac. 774, 1904.

The rule of *Booth* v. *Clark*, is clearly followed in only 3 states:

IOWA
Baird v. *Cole*, 207 Ia. 664, 1929;
Wyman v. *Eaton*, 107 Ia. 214, 1899.

MASSACHUSETTS
Homer v. *Barr Pumping Engine Co.*, 180 Mass. 163, 1901.

TEXAS
Moseby v. *Burrow*, 52 Texas 396, 1880;
Moreau v. *Du Bellet*, 27 S. W. 503, Court of Civil Appeals, Texas, 1895.

It appears that the other states in this country have not considered the question.

effect in a case where reason and justice would thus be defeated.

While the rule seems to have become fixed in the Federal Courts that, in their view, considerations of state comity should not permit a foreign equity receiver to sue even in a Federal Court situated, for example, in the state of New York, which, applying its own view of comity, permits such suit, it would seem that the procedure which was here adopted has given full and adequate recognition to and compliance with that rule.

The receiver in applying for and obtaining his appointment as ancillary receiver, thus submitted himself to the control and jurisdiction of the Federal District Court in the Southern District of New York and went under bond for the protection of the local creditors, if any, of that state; and this gave full recognition and protection to the interests of the possible local creditors, and much greater recognition than the courts of New York would have seen fit to require upon behalf of its own citizens in case recourse had been had to the Courts of the state rather than to the Federal Court located in New York.

At most the rule says that the protection of local creditors requires the denial of interstate comity to foreign receivers. But a bonded, ancillary receiver, appointed as was the petitioner, is subservient to the orders and directions of the local Federal Court which appointed him and clearly is as accountable to local creditors as though his appointment had been obtained in a separate suit.

There is no underlying difficulty arising from questions of jurisdiction or judicial power to act even in permitting a foreign receiver as such to sue. This is made clear both by the decisions of this court, as well as of the numerous state courts. As shown by the decision of this

court in *Grant* v. *Leach, supra,* it is proper in the Federal courts to permit an equity receiver to sue beyond the confines of the district of the appointing court so long as he does not cross a state border; and as shown above the majority of the states which have considered the matter permit a foreign equity receiver to cross the state border to sue.

As shown also by the decisions referred to at the beginning of the argument, the procedure here adopted in procuring the ancillary appointment violated no principle relating to jurisdiction or judicial power.

Nothing more is involved than what this court shall deem to be a suitable compliance with its own view of the regard which should be given to the states' comity. We submit that it should be fully sufficient for these purposes that the ancillary receiver, who is appointed for the purpose of the suit, be appointed by petition as was done in the instant case.

The decision goes farther than holding that the appointment of the ancillary receiver was irregular. The Court below held that the appointment was entirely void and could be collaterally attacked.

But it is established law that this appointment of the ancillary receiver may not be collaterally attacked.

In *Cadle* v. *Baker,* 87 U. S. 650, 22 L. Ed. 448, Waite, *Chief Justice,* said:

> "The debtors of a bank, when sued by a receiver, cannot inquire into the legality of his appointment. It is sufficient for the purposes of such a suit that he has been appointed and is receiver in fact."

The rule of this case has been applied to the receiver of an industrial corporation in *Grant* v. *Leach & Co.,*

280 U. S. 351, 74 L. Ed. 470 (1930). The Court said by Sanford, *J.*, at page 359:

> "It is questioned whether under this statute the court rightly appointed, under the petition of the mortgage trustee, a receiver of the portion of the furnace company's property which was not covered by the mortgage; * * *. But, however, this may be, the court had jurisdiction and the power to determine these questions. * * * And plainly the validity of the appointment could not have been questioned by a collateral attack in another court. See *Cadle* v. *Baker,* 20 Wall. 650, 651, 22 L. ed. 448, 449; *Shields* v. *Coleman,* 157 U. S. 168, 178, 39 L. ed. 660, 663, 15 Sup. Ct. Rep. 570; *Lively* v. *Picton,* 134 C. C. A. 189, 218 Fed. 401, 406; *Lydick* v. *Neville,* (C. C. 8th), 287 Fed. 479, 482; *Olmstead* v. *Distilling & Cattle Feeding Co.,* (C. C.), 73 Fed. 44, 48; *Shinney* v. *North American Sav. Loan & Bldg. Co.,* (C. C.), 97 Fed. 9, 10; *Barbour* v. *National Exch. Bank,* 45 O. S. 133, 140, 12 N. E. 5; *McNary* v. *Bush,* 35 Or. 114, 117, 56 Pac. 646."

The defendants in their brief and upon the argument below put great stress upon the decision of the Circuit Court of Appeals in the case of *Sterrett* v. *Second National Bank,* 246 Fed. 753 (C. C. A. 6th, 1917), which was affirmed by this Court. In this case the Court said at page 758:

> "A defense that plaintiff has no title to the asserted right of action is always open.
>
> "* * * But lack of title in plaintiff is not a mere 'technicality,' in the ordinary meaning of that term, for there is always, theoretically at least, a possibility that defendant may be subjected to further suit by the owner of the title and right of action. The present difficulty could

> readily have been avoided by ancillary receivership and the dismissal of the case will not necessarily preclude further proceedings. Whether an ancillary receivership, and an ancillary bill thereunder, would save the present suit from dismissal, we need not decide. See *Coal & Iron R. Co.* v. *Rehcrd,* (C. C. A. 4th C.), 123 C. C. A. 155, 204 Fed. 859, 882."

We have set out at page 9 above, the holding in the *Coal & Iron Ry. Co.* case, and the Circuit Court of Appeals by referring with approval to that case certainly indicated that, had the objection been merely one to the validity of the appointment of an ancillary receiver, it could not have been raised collaterally. The decision in the *Sterrett* case cannot therefore be taken as out of line with the rule laid down by this Court in *Cadle* v. *Baker, supra,* and recently applied by it in *Grant* v. *Leach, supra,* that the validity of the appointment of the ancillary receiver may not be collaterally attacked.

The Court should have in mind that in the *Sterrett* case, a foreign receiver as such had brought the suit, claiming that he as such receiver had *title* to the assets of the corporation and for that reason could sue under the exception to the doctrine of *Booth* v. *Clark,* established by the decision of *Bernheimer* v. *Converse.* The Court held that the foreign receiver could not maintain the action for the reason that he did not have *title,*—that he was not a quasi-assignee within the meaning of the *Bernheimer* decision.

But the complainant in the instant case has never attempted to sue in his capacity as a foreign receiver and *never has made the least claim of title.* His position is that, since for the reason that he did not have title and

under the doctrine of *Booth* v. *Clark,* could not maintain this suit, he therefore, in compliance with that doctrine, took proceedings to bring about his appointment as ancillary receiver. The only question presented is the sufficiency of the proceedings resulting in such appointment.

As we believe we have demonstrated above, there can be no question here of jurisdiction in any sense, or of the power of the United States District Court to make the order appointing the complainant ancillary receiver. We submit that the order of the United States District Court of the Southern District of New York, dated the 23rd day of March, 1932, which appointed the complainant as ancillary receiver is not subject to collateral attack in this suit by these defendants.

Finally, we submit that the appointment of the petitioner as ancillary receiver is valid and he has the right as such to maintain this suit and that the appointment cannot be collaterally attacked.

CONCLUSION

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED WITH COSTS HERE AND IN THE COURT BELOW.

New York, September, 1934.

Respectfully submitted,

RALPH ROYALL,
WILLIAM A. MAGEE,
CLARK MILLER,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1934

No. 11

GEORGE W. McCANDLESS, as Receiver of DUQUESNE GAS CORPORATION,

Petitioner,

against

MAXIME H. FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1934

No. 11

GEORGE W. MCCANDLESS, as Receiver of DUQUESNE GAS CORPORATON,
Petitioner,

against

MAXIME H. FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION, *et al.*

PETITIONER'S REPLY BRIEF

We do not doubt that, broadly stated, the exercise of the judicial power requires a "case or controversy" and that this "implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication." (*Muskrat* v. *United States,* 219 U. S. 346, 55 L. Ed. 246 (1911), pp. 6 and 7 of respondents' brief.)

But all courts, the Federal Courts included, have certain inherent powers, and amongst such is the power to come to the assistance of another Court in which a case is pending.

Mr. Justice Field in the case of *Re Pacific Railway Commission,* 32 Fed. 241 (C. C. N. D. Calif. 1887) (it is his language above quoted which was quoted with approval by this Court in the *Muskrat* decision) at page 256 says:

> "There are certain powers inherent in all courts."

As an instance of this, the Court goes on to state:

> "* * * courts of justice of different countries are bound mutually to aid and assist each other, for the

> furtherance of justice; and hence, when the testimony of a foreign witness is necessary, the court before which the action is pending may send to the court within whose jurisdiction the witness resides a writ * * *. By this instrument the court abroad is informed of the pendency of the cause, and the names of the foreign witnesses, and is requested to cause their depositions to be taken in due course of law, for the furtherance of justice * * *."

We submit that a Court, in appointing an ancillary receiver, acts in aid of the Court in which the primary case is pending, and that this applies equally whether the proceeding for the appointment of the ancillary receiver be by the petition of the primary receiver or in the form of a separate ancillary bill.

As to the latter, although it is in form a separate suit, it is in reality a transparent simulation of a case or controversy,—it is unreal. Such proceeding in the form of a separate suit is regarded in every sense as ancillary to the primary receivership, with the consequence that the parties to the primary suit are deemed to be before the court in the ancillary receivership proceeding without the necessity of any *subpoena ad respondendum* (*Bluefields SS. Co.* v. *Steele,* 184 Fed. 584 (C. C. A. 3rd 1911)). Furthermore, the defendant in the primary suit, having consented therein to the appointment of the receiver, is powerless to object in the ancillary suit to the appointment of an ancillary receiver (*Walker* v. *U. S. Ltg. & Htg. Co.,* 220 Fed. 393 (D. C. S. D. N. Y. 1915)). The two prime essentials of a case are, therefore, absent: first, the obtaining of jurisdiction of the defendant, and, second, a controversy to be litigated. If, according to its form, it were viewed strictly as a separate suit which had to stand upon its own bottom, it would offend the rule set forth in the *Muskrat* decision that

a case or controversy "implies the existence of present or possible adverse parties whose contentions are submitted to the Court for adjudication."

Moreover, an ancillary proceeding in aid of a pending suit need not conform to all the jurisdictional requirements of an independent case.

In the case of *White* v. *Ewing,* 159 U. S. 36, 15 Sup. Ct. Rep. 1018, 40 L. Ed. 67, (1895) which is cited at page 33 of respondents' brief, this Court by Mr. Justice Brewer held that suits brought by a mere Federal equity receiver in the Court in which the primary suit is pending to recover upon promissory notes payable to the corporation in receivership are to be regarded as suits ancillary to the main suit, with the result that the limitations as to diversity of citizenship and amount in controversy do not apply to such suits.

In the *Bluefields SS. Co.* case, *supra,* the principle was applied to ancillary suits in other jurisdictions. The court said at page 587:

> "While an ancillary proceeding of the kind here considered will be controlled by the court before which it is prosecuted, and in that sense is an independent proceeding, its ultimate object is to aid the purpose of the original suit, and in that sense it is ancillary. Jurisdiction in such an ancillary suit therefore no more depends on diversity of citizenship than it does in a suit ancillary to an original suit pending in the same court. It depends alone on the existence of an original suit in one court which may properly be aided by proceedings in another court. It is unnecessary to refer to cases in which the federal courts have appointed receivers ancillary to receiverships in other jurisdictions without regard to the citizenship of the parties. There are many of them. One is *Southern Railway* v. *Carnegie Steel Co.,* 176 U. S. 257, Sup. Ct. 347, 44 L. Ed. 458."

It is entirely clear, therefore, that even the statutory limitations upon the jurisdiction of the Federal Courts are not, in a strict sense, controlling upon suits which may properly be regarded as in their nature ancillary to a primary case.

In the last analysis, the exercise of the judicial power in such situations chiefly emanates from the inherent power of the ancillary Court to come to the aid of the Court in which the primary case is pending.

Furthermore the requirement of a case is often satisfied for the purpose of preliminary proceedings, though actual suit on the basis of the possible controversy cannot be instituted till a later time. It "implies the existence of present or *possible* adverse parties". In connection with this statement Mr. Justice Field prepared a note (printed at p. 257 of 32 Fed.) which points out that Federal Courts have inherent jurisdiction over proceedings of grand juries and proceedings to perpetuate testimony though the actual case or controversy is only contemplated in the future.

At the very most, the difference in the two varying procedures which have been in vogue, perhaps about equally, is one of form.

As was done here, the primary receiver, by filing his petition setting out his appointment as such primary receiver and the exemplified copies of the proceedings in the pending primary suit and the need of the ancillary appointment in order to aid the primary Court, has adopted a form of procedure in line with the nature of the relief which the ancillary Court is being asked to grant. It is in accord with the legal and practical realities.

Where, however, the procedure by separate bill is adopted and a separate case thus merely simulated, although what is really being sought is the giving by the ancillary

Court of its aid to the case which is pending in the primary Court, the form of the procedure is less in accord with the realities.

If the ancillary Court should be deemed not to have the inherent power thus to come to the aid of the Court in which the primary case is pending and the decision of the Circuit Court of Appeals should thus be sustained, it would seem clearly to follow that such ancillary receiverships, whether brought about by the one form of procedure or the other, would be void, for it cannot truly be said that a transparently simulated case, such as is commonly constructed when the procedure adopted is by ancillary bill, really presents a separate case or controversy.

If the Court should hold as the respondents contend, that the only proper practice is to have a simulated bill in the foreign Court in order properly to bring about the appointment of an ancillary receiver, the primary Court would be powerless in many instances adequately to perform its trust. If, for example, the creditor who had brought the original primary bill could not, because of death or because of lack of diversity of citizenship in the ancillary jurisdiction, or would not, even if for venial reasons, participate in the simulated ancillary bill, the Courts would be helpless, with the consequence that defaulting fiduciaries, such as these defendants, must have immunity from accountability. It would scarcely do to say that under such circumstances the primary Court, through its receiver, could canvass about and find some other creditor with the requisite qualifications to cooperate in a simulated ancillary bill. Such a creditor might not exist, or, if he could be found, might not, for reasons good or bad, be willing to lend his aid. In any case it is not a happy thought that the law should put an officer of the Court, and virtually the Court for whom he is acting, in such an unbecoming position.

At page 11 of their brief, the respondents state:

> "* * * mere federal equity Receivers have no official power beyond the jurisdiction of the Courts appointing them * * *"

The authorities are to the contrary.

In *Horn* v. *Pere Marquette R. Co.*, 151 Fed. 626, (C. C. E. D. Mich. 1907) Judge Lurton states as follows at page 631:

> "*Zacher* v. *Fidelity Trust, etc., Co.*, 106 Fed. 593, 45 C. C. A. 480, *Booth* v. *Clark*, 17 How. 322, 15 L. Ed. 164, and *Great Western Mining, etc. Co.* v. *Harris*, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163, bear upon the disability of a receiver appointed by a court of one jurisdiction to sue in the courts of another, and have no application when the question is, as here, as to the authority of a receiver appointed by a federal court of one district over property situated in another district of the same state. Federal courts of different states are undoubtedly foreign courts as to each other in as full sense as are state courts of different jurisdictions. But it has never been held, that a federal court of one district is a foreign court as to another federal court of the same state, and manifestly, this is not so * * * ."

So it is clear that it is not a question of the *official power* of the receiver to act beyond the confines of the court which appointed him.

It is stated by this Court in *White* v. *Ewing*, quoted at page 33 of the respondents' brief, as follows:

> "* * * the possession of the receiver is the possession of the court; and the court itself holds and administers the estate through the receiver as its officer."

The Court was thus speaking of a mere Federal equity receiver.

Nevertheless, we do not believe that anyone would for a moment question that such a receiver could sue in a Federal Court foreign to the jurisdiction of his appointment for the recovery of the purchase price of assets of the receivership which had been sold by him pursuant to the direction of the primary Court, and this was recently so held in the case of *Morris* v. *Wisconsin Hydraulic,* 4 Fed. Supp. 991 (D. C. S. D. N. Y. 1933).

In the case of *Oakes* v. *Lake,* 290 U. S. 59, 78 L. Ed. 15, (1933) cited at page 9 of respondents' brief, this Court held that a foreign receiver could sue in the Federal Courts to recover possession of assets of the receivership estate, the dominion over which had been asserted against him. Although the receiver in that case was a State equity receiver rather than a Federal equity receiver, we do not think that anyone would doubt that the result would be the same in the case of any equity receiver whether Federal or State.

Whatever proceeding a receiver takes in line with the proper performance of his trust must properly be regarded as performed by virtue of his office. The receiver's official power or capacity to act is not so strictly limited as the respondents seem to think.

The question involved in this Court's decision in *Booth* v. *Clark,* and the other cases referred to by the respondents, is concerned, not with the power of the receiver, but merely with a question of state comity.

The respondents' argument that the primary receiver could not, because of lack of official power to do so, seek an order for the appointment of an ancillary receiver in aid of the primary suit is without the least legal foundation.

And the primary receiver, in seeking the appointment of an ancillary receiver in aid of the primary suit, was not

thus seeking to avoid the rule of *Booth* v. *Clark,* but was acting pursuant to that rule and in conformity with it.

At pages 18-21 of their brief, the respondents discuss the cases of *Rust* v. *United Water Works Co.,* 70 Fed. 129, (C. C. A. 8th 1895) and *Mitchell* v. *Maurer,* 69 Fed. (2nd) 233, (C. C. A. 9th 1934) which are cited by us. They state that these cases are distinguishable for the reason that in the one, by virtue of a New Jersey statute, and in the other, by virtue of a Delaware statute, the primary receivers took title to the corporate assets. At page 8 also they state that Delaware and New Jersey statutes provide that the receiver of a corporation organized under the laws of such states become vested with title to the corporation's property.

As to the *Rust* case, which arose in 1894, the New Jersey statute giving to the receiver title to the assets of the corporation, to which reference is thus made, but which is not specifically cited, did not become a law until 1896 (Public laws of New Jersey 1896, page 299).

While it is true in respect of the case of *Mitchell* v. *Maurer* that, at the time of the appointment in Delaware of the primary receivers, there was in effect Section 3884 of the Revised Code of Delaware, which provides that a receiver of a Delaware corporation appointed by a Delaware Court of Chancery is vested with title to the corporation's property, this fact does not, nevertheless, distinguish the case. The question involved in that case was not the right of the foreign receiver to sue. In that case, as in the instant case, the primary receivers had, upon their *ex parte* petition in the California District Court, obtained an order for the appointment of ancillary receivers. That appointment was made the subject of a *direct* attack on grounds similar to the grounds urged by the respondents herein. The question decided by the Court was that the appoint-

ment of the ancillary receivers brought about by such form of procedure was proper.

At page 28 of their brief, the respondents comment upon the numerous decisions of the state courts referred to in the note at the bottom of page 21 of our main brief, and state that "An examination of these decisions shows that many of these actions were instituted by receivers who under the laws of the State of their appointment were also quasi assignees." They fail to specify which cases. In preparing the note, we studiously refrained from citing cases the decision of which was based upon the *Bernheimer* v. *Converse* exception. Although the reports in several of the cases are somewhat obscure, we think that the cases cited in our note for the proposition stated all accepted the proposition that a foreign chancery receiver should be permitted by comity to sue, and that they are fairly cited for that proposition.

We beg leave to correct an error at the top of page 21 of our main brief. Our statement respecting the case of *Grant* v. *Leach* referred to the receiver as "a federal equity receiver" whereas in fact the receiver was a state equity receiver.

Respectfully submitted,

RALPH ROYALL,
WILLIAM A. MAGEE,
CLARK MILLER,
Of Counsel.

No. [redacted] 11

APR 18 1
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No.

GEORGE W. McCANDLESS, as Receiver of Duquesne Gas Corporation,
Petitioner (Complainant-Appellee-Appellant Below),

—against—

MAXIME H. FURLAUD and KINGSTON CORPORATION,
Defendants-Appellants-Appellees Below,

and

BYRON CORPORATION and CHAUCER CORPORATION,
Defendants-Appellees Below,

and

CARLOS REUTER,
Defendant Below.

BRIEF OF APPELLEES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LOUIS B. EPPSTEIN,
IRA W. HIRSHFIELD, and
LOUIS J. ALTKRUG,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No.

GEORGE W. MCCANDLESS, as Receiver of Duquesne Gas Corporation,
Petitioner (Complainant-Appellee-Appellant Below),

—against—

MAXIME H. FURLAUD and KINGSTON CORPORATION,
Defendants-Appellants-Appellees Below,

and

BYRON CORPORATION and CHAUCER CORPORATION,
Defendants-Appellees Below,

and

CARLOS REUTER,
Defendant Below.

BRIEF OF APPELLEES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This brief is submitted in opposition to a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, presented by complainant in the court below.

The United States Circuit Court of Appeals for the Second Circuit reversed a decree entered by the United States District Court for the Southern Dis-

trict of New York in favor of complainant and based its reversal solely on the ground that the petitioner did not have title to the cause of action sued on.

Statement.

I.

Concerning the Facts.

Since the Circuit Court of Appeals for the Second Circuit deemed it unnecessary to pass upon the facts involved in the alleged cause of action, we assume that this Court, under its well-established practice, will not do so. Nevertheless, we find it necessary briefly to state the actual facts as proven in order that we may not be prejudiced by the erroneous conclusions which the petitioner has drawn therefrom and which he has set up as the facts of this case.

The actual facts are:

A. Maxime H. Furlaud and Carlos Reuter were stockholders and executive officers of a corporation at that time known as Furlaud & Company, Inc.

B. Kingston Corporation was a wholly owned subsidiary of Furlaud & Company, Inc. (fol. 954).

C. Kingston Corporation acquired options upon certain properties in Pennsylvania and also owned certain other properties outright, all of which were acquired with funds furnished by Furlaud & Company, Inc. (fols. 228-234, 246-250, 349-352).

D. Furlaud & Company, Inc. next caused Duquesne Gas Corporation to be incorporated, and ac-

quired all of its originally issued stock (fols. 158-159, 369, 885-891).

E. Furlaud & Company, Inc. caused Kingston Corporation to transfer to Duquesne Gas Corporation its properties and options in consideration of Duquesne Gas Corporation assuming an obligation of Kingston Corporation and delivering to Kingston Corporation certain bonds and stock of Duquesne Gas Corporation (fols. 354-356, 362-363, 868-878).

At the time of this transaction Furlaud & Company, Inc. was the only stockholder of Duquesne Gas Corporation.

F. Furlaud & Company, Inc. subscribed for all of the remaining unissued stock, bonds, and notes of Duquesne Gas Corporation and paid for them with funds borrowed for that purpose (fols. 349-355, 485-488, 946-950).

No person, other than Furlaud & Company, Inc. and its wholly owned subsidiary, Kingston Corporation, ever acquired a share of stock, or a bond, or a note directly from Duquesne Gas Corporation (fols. 487-489).

G. Prior to actually taking over the properties, Furlaud & Company, Inc. organized two selling groups and offered the Duquesne Gas Corporation bonds to the public when, as, and if issued (fols. 320, 506-527, 763-771).

H. It issued circulars which contained quotations from a letter written by the Vice President of Duquesne Gas Corporation, addressed to Furlaud & Company, Inc. which, among other things, stated:

> "These bonds are issued by the Corporation in connection with the acquisition of properties and to provide cash for developments, ex-

tensions and other corporate purposes" (fol. 809).

The circulars stated that the foregoing was "quoted from a letter from the Vice President of the Corporation to the Bankers" (fols. 792, 830).

I. Subscriptions addressed to Furlaud & Company, Inc. for the purchase of bonds were received by Furlaud & Company, Inc. in large amounts and it proceeded to close the deal (fols. 493, 539, 542, 771-772).

J. Every check received from these subscribers was made payable to Furlaud & Company, Inc. and, as received, was used in paying off the loans made by Furlaud & Company, Inc. (fols. 486-497, 531, 539, 542).

K. Many of these checks were received on the actual date of closing (fols. 539, 542).

A.

The complainant contends that as a result of the foregoing representation in the offering circular all the monies received from the sale of these securities by Furlaud & Company, Inc. were delivered to it in trust and that Duquesne Gas Corporation acquired a property right in such funds.

B.

The defendants contend that as a result of these transactions no injury of any kind did or could have resulted to Duquesne Gas Corporation and that if any misrepresentations were made to any purchaser of bonds, or notes, or stock to his damage, he, and he alone, had a personal cause of action as a result thereof.

Mr. Justice Holmes in the case of *Old Dominion Copper Co.* v. *Lewisohn,* 210 U. S. 206, at page 212, says:

> "At the time of the sale to the plaintiff, then, there was no wrong done to anyone. Bigelow, Lewisohn, and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land. * * * *If there was a wrong, it was when the innocent public subscribed. But what one would expect to find, if a wrong happened then, would not be that the sale became a breach of duty to the corporation nunc pro tunc, but that the invitation to the public without disclosure, when acted upon, became a fraud upon the subscribers from an equitable point of view, accompanied by what they might treat as damage. For it is only by virtue of the innocent subscribers' position and the promoter's invitation that the corporation has any pretense for a standing in court. If the promoters, after starting their scheme, had sold their stock before any subscriptions were taken, and then the purchasers of their stock, with notice, had invited the public to come in, and it did, we do not see how the company could maintain this suit. If it could not then, we do not see how it can now."* (Italics ours.)

II.

Concerning the Proceedings.

The statement contained in the petition for a writ of certiorari regarding the appointment of Mr. Mc-

Candless as a Chancery Receiver by the United States District Court for the Western District of Pennsylvania is correct.

Petitioner's statement concerning the *ex parte* proceedings taken by Mr. McCandless in the United States District Court for the Southern District of New York to have himself appointed ancillary receiver of the Duquesne Gas Corporation is also correct. We desire, however, to call the Court's attention to the fact that in the Southern District of New York, no bill of complaint was filed against the Duquesne Gas Corporation by a judgment creditor, no answer was interposed by the Duquesne Gas Corporation,—in short, there was no suit pending in that Court at the time that Mr. McCandless was appointed Ancillary Receiver.

The statement at page 3 of the petition for a writ that "upon the appeal the defendants Maxime H. Furlaud and Kingston Corporation raised for the first time the question of the complainant's title to sue" is not correct.

Complainant, in paragraph "Fourth" of his amended bill of complaint, alleged that "upon petition of the complainant * * * an order was duly made on the 23rd day of March, 1932, by the said last mentioned Court appointing said complainant, George W. McCandless, as Ancillary Receiver of Duquesne Gas Corporation, which last mentioned order duly authorized the complainant, as such Receiver, to bring this suit * * *" (fols. 18-19).

Defendants, in paragraph "3" of their answers, alleged: "With respect to the allegation of paragraph 'Fourth' of the amended bill of complaint, defendant denies having information sufficient to form a belief with respect thereto and leaves the complainant to his proof thereof" (fols. 135, 156, 177, 198).

That this denial properly raised the issue in the lower Court is settled by the decision of this Court in *Grant* v. *Leach & Co.,* 280 U. S. 351.

See also *Homer* v. *Burr Pumping Engine Co.,* 180 Mass. 163.

Questions Involved in the Petition.

Stripped of verbiage, the contention of the Petitioner is as follows:

1. That the doctrine announced in the case of *Booth* v. *Clark,* 17 How. 322, 15 L. Ed. 164, is obsolete; that the case was decided in 1855; that many changes have occurred in the relations existing between our various States since then and that the rule there announced should now be discarded.

2. That the decision of this Court in the case of *Old Dominion Copper Co.* v. *Lewisohn,* 210 U. S. 206 and that of the Circuit Court of Appeals for the Second Circuit in the case of *Ball* v. *Breed,* 294 Fed. 227, upon which this Court refused to grant a writ of certiorari (264 U. S. 584), should be revised.

We contend:

1. Although the case of *Booth* v. *Clark* was decided in 1855, the rule therein expressed has been so often affirmed and reaffirmed by this Court that it is now the well settled law of the land.

See for example:

Great Western Min. & Mfg. Co. v. *Harris,* 198 U. S. 561;

Sterrett v. *Second Nat. Bank,* 248 U. S. 73;

Oakes v. *Lake,* 78 L. Ed. (Adv. Ops.) 15;
Moore v. *Mitchell,* 281 U. S. 18;
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Grant v. *Leach & Co.,* 280 U. S. 351;
Porter v. *Sabin,* 149 U. S. 473;
Bank of Bethel v. *Pahquioque Bank,* 14 Wall. 383;
Atlantic Trust Co. v. *Chapman,* 208 U. S. 360;
Converse v. *Hamilton,* 224 U. S. 243;
Bernheimer v. *Converse,* 206 U. S. 516.

As late as November 6, 1933, in the case of *Oakes* v. *Lake,* 78 L. Ed. (Adv. Ops.) 15, this Court in an opinion written by Mr. Justice Sutherland, says (p. 17):

> "The general rule *undoubtedly* is that an ordinary chancery receiver, having no other authority than that arising from his appointment as such, cannot as of right maintain an action in a state other than that in which he was appointed. *The decision in Booth* v. *Clark,* 17 How. 322, 15 L. Ed. 164, *to that effect has been uniformly followed by this court.*" (Italics ours.)

In *Sterrett* v. *Second Nat. Bank,* 248 U. S. 73, this Court after saying (p. 76):

> "Since the decision of this Court in *Booth* v. *Clark,* 17 How. 322, 15 L. Ed. 164, it is the settled doctrine in Federal jurisprudence that a chancery receiver has no authority to sue in the courts of a foreign jurisdiction to recover demands or property therein situated."

and after some further discussion of the rule says (p. 77):

> "The system established in *Booth* v. *Clark*

> has become the settled law of the Federal courts, and if the powers of chancery receivers are to be enlarged in such wise as to give them authority to sue beyond the jurisdiction of the appointing court, such extension of authority must come from legislation, and not from judicial action."

In the face of this unbroken line of decisions, we can see no merit in the statement contained in the Conclusion of the petition for a writ to the effect that

> "It is most important * * * for the Court also to give consideration to the wisdom of continuing a rule of policy laid down in *Booth* v. *Clark* under which comity has been denied to equity receivers to sue in a jurisdiction beyond that of their appointment."

Nor can we agree with petitioner's statement of the effect of these decisions. They do not deny comity to any one having a cause of action or having a right of property to sue anywhere in the United States. They merely announce and reiterate the very clear proposition of law that a mere federal chancery receiver, having no title other than that which arises from his appointment as such, has no power of action and has no right, title, or interest in property beyond the jurisdiction of the Court appointing him.

Moreover, in connection with the statement of this Court in the *Sterrett* case, *supra,* that if the powers of chancery receivers are to be enlarged in such wise as to give them authority to sue beyond the jurisdiction of the appointing court, such extension of authority must come from legislation and not from judicial action, it seems pertinent to call attention to the fact that at least two efforts have been made to cause Congress to enlarge the powers of chancery receivers in the manner suggested.

In Section 56 of the Judicial Code, 36 Stat. 1102, 28 U. S. C. A. 117, Congress has provided a method by which the powers of federal receivers might be extended where land, or other property of a fixed character, lies within different states in the same judicial circuit in which the receiver is appointed. However, even in this act, Congress has very carefully pointed out the exact procedure to be followed before a receiver may obtain this very limited extension of power.

In the 2nd Session of the 71st Congress, several bills were introduced (H. R. 9,997, 9,998, 9,999 and 10,000) the purpose of which was to grant extraterritorial powers to equity receivers in all of the judicial circuits of the United States. At the hearings before the Committee on the Judiciary of the House of Representatives, the question of whether this result could be accomplished by changes in the Federal Equity Rules by the United States Supreme Court was discussed. It was there asserted that the question was one of jurisdiction, that jurisdiction could not be vested in courts by an equity rule, and that Congress alone had the power to act in this matter (Hearings before the Committee on the Judiciary, House of Representatives, 71st Congress, 2nd Session, on H. R. 9,997, 9,998, 9,999 and 10,000, p. 13). Congress failed to grant this power.

Petitioner in his brief next refers to two cases decided by this Court wherein certain receivers of corporations who were appointed by State courts and who were clothed with title to all of the property of the corporations wherever located were permitted to sue in foreign jurisdictions, namely, *Bernheimer* v. *Converse,* 206 U. S. 516, 51 L. Ed. 1163, 27 S. C. 755 (1907), and *Converse* v. *Hamilton,* 224 U. S. 243, 56 L. Ed. 749, 32 S. C. 415 (1911).

In both of these cases the rule, laid down in *Booth* v. *Clark,* was reiterated and reaffirmed.

This Court pointed out that the receivers in those cases were not mere chancery receivers (such as petitioner in this case is), but much more. They were appointed by State courts and under the laws of the States of their appointment they became *quasi assignees,* vested with the rights of creditors against the stockholders and charged with the enforcement of those rights in the Courts of the State and elsewhere; and the right to maintain an action in another State under these circumstances could not be denied without violating the full faith and credit clause of the Constitution.

In the case of *Oakes* v. *Lake,* 78 L. Ed. (Adv. Ops.) 15, the Court says, in referring to *Converse* v. *Hamilton, supra,* as follows (p. 17):

> "In the case just dealt with, and in other cases where the receivership property has been assigned to the receiver by its owner, the suit is brought not strictly in his capacity as receiver, by virtue of his appointment in another state, but in his capacity as assignee. High, Receivers, 4th ed. § 244. His designation as receiver, etc. in the title of the cause may be regarded as *descriptio personae* merely."

In this case, there is no such question presented. Mr. McCandless was a mere federal chancery receiver and he neither had nor did he claim that he had title to these demands by conveyance or by statute. Except for his appointment as Receiver by the United States District Court for the Western District of Pennsylvania, he had no power of any kind,

no right, title or interest in or to any of the property of Duquesne Gas Corporation and he claimed none. He was a mere federal chancery receiver and nothing more.

Petitioner's contention that even if this receiver had no power to bring an action in his official capacity in this jurisdiction, he still might have the power to institute an *ex parte* proceeding here and have himself appointed ancillary receiver, has been negatived by an unbroken line of decisions and authorities.

Greene v. *Star Cash & Package Car Co.*, 99 Fed. 656;
In re Brant, 96 Fed. 257;
Walker v. *United States Light & Heating Co.*, 220 Fed. 393, at 395;
Fairview Fluor Spar & Lead Co. v. *Ulrich*, 192 Fed. 894;
Pressley v. *Harrison*, 102 Ind. 19;
Baker v. *Backus' Adm'r*, 32 Ill. 96;
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2 Beach, Mod. Eq. Prac., Section 721;
2 Daniell, Ch. Pl. & Prac. (6th Ed.), page 1734;
3 Street "Federal Equity Practice", Sections 2542, 2694-2695;
C. W. Wickersham, "Primary and Ancillary Receiverships", 14 Virginia Law Review 599, 601.

The very petition that he filed before the District Court for the Southern District of New York estab-

lished the fact that he had no interest in any subject matter which might be involved in that proceeding. There was nothing upon which the jurisdiction of the District Court for the Southern District of New York could attach. There was no aggrieved party plaintiff before that Court. There was no defendant before that Court. There was nothing before the Court over which it had jurisdiction.

None of the cases cited by the petitioner are in conflict with our views.

In the case of *Rust* v. *United Waterworks Co.*, 70 Fed. 129, Rust was the receiver of a corporation appointed by a court of a State under a law which provided that such receiver should succeed to its property, and to the right to act for the corporation. He was not a mere chancery receiver. He was a *quasi assignee* with title to its property wherever situated. His right to bring that suit as assignee could not be questioned. His designation of himself as receiver in the title of the cause is regarded as *descriptio personae* merely. This decision is in harmony with the decision of this Court in *Oakes* v. *Lake, supra,* and the cases there cited.

In the case of *Bluefields S. S. Co.* v. *Steele,* 184 Fed. 584, a bill was filed by a creditor and not by a foreign receiver, and the defendant corporation had entered its appearance.

Walker v. *United States Light & Heating Co.,* 220 Fed. 393, merely holds that a corporation having once consented to the appointment of a receiver upon the application of a simple contract creditor could not, upon the application of a simple contract creditor in another court for the appointment of an ancillary receiver, object solely on the ground that the

petitioner was not a judgment creditor. The Court, in that case, was very careful to point out the absolute necessity of the filing of a bill by a proper complainant.

No case has been cited by the petitioner, and we have been unable to find a single case decided by any Court in the United States of America, in which the appointment of an ancillary receiver upon the application of a mere foreign federal chancery receiver has been upheld.

2. The second question raised by the petitioner is that the cases of *Ball* v. *Breed,* and *Old Dominion Copper Co.* v. *Lewisohn, supra,* should now be reversed or modified.

The doctrine laid down in these cases has been recognized in the decisions of many courts.

See:

Blum v. *Whitney,* 185 N. Y. 232;
Tompkins v. *Sperry, Jones & Co.,* 96 Md. 560;
Mile Wide Copper Co. v. *Piper,* 29 Ariz. 129;
Turner v. *Markham,* 155 Cal. 562;
Hamilton v. *Hamilton Mammoth Mines,* 110 Or. 546;
Higgins v. *Lansingh,* 154 Ill. 301;
Hoffman Motor Truck Co. v. *Erickson,* 124 Minn. 279.

It is the settled law of the land. We do not feel justified in further discussing the question of the applicability of the rule of the *Lewisohn* case to the facts of the case at bar for the reason that the Cir-

cuit Court of Appeals did not deem it necessary to consider or pass upon those facts which were at issue in that Court, and we assume that they will, therefore, not be considered by this Court on this application.

Grant v. *Leach & Co.,* 280 U. S. 351, at page 363;
Buzynski v. *Luckenbach S. S. Co.,* 277 U. S. 226, at page 228;
Brown v. *Fletcher,* 237 U. S. 583.

Conclusion.

In conclusion we insist that there are no special or important reasons which would justify a review of this case on writ of certiorari. Nor does this case come within any of the character of reasons which the United States Supreme Court has specified as furnishing grounds for the granting of a writ (Rule XXXVIII of the General Rules of the United States Supreme Court).

It is not a case where the Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter. Upon the questions here involved the decisions of the Circuit Courts of Appeals are uniformly in harmony with the decision rendered in this case.

It is not a case in which a Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been settled

by this Court; or has decided a federal question in a way probably in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

On the contrary, every question involved in this petition has been definitely passed upon by this Court as well as by a number of the Circuit Courts of Appeals in the United States.

There is no conflict in these decisions.

The actual purpose of this application is to cause this Court to give consideration to the wisdom of changing the rule laid down by it in *Booth* v. *Clark,* and so often approved and reaffirmed by it.

In view of the very explicit statement of this Court in *Sterrett* v. *Second Nat. Bank, supra,* that "if the powers of chancery receivers are to be enlarged in such wise as to give them authority to sue beyond the jurisdiction of the appointing Court, such extension of authority must come from legislation, and not from judicial action", we respectfully submit that this Court has decided that it has no power to change that rule.

It is true that in the petition it is also suggested that this Court should review its decision in *Old Dominion Copper Co.* v. *Lewisohn,* and determine its applicability to the facts of this case. The decision of the Circuit Court of Appeals, however, was based solely on the proposition that this complainant had no title to any cause of action in the

jurisdiction where the suit was brought and the bill was dismissed for that reason alone.

The Circuit Court of Appeals expressly stated that it need not now decide whether the transactions testified to resulted in a misappropriation of funds or a legitimate profit.

Unless therefore this Court should see fit not only to reverse the rule announced in the case of *Booth* v. *Clark* and in the many cases reaffirming that rule, but should also see fit to change its rule of practice to the effect that it will not in the first instance review questions of fact not passed upon by the Circuit Court of Appeals, we do not believe it will consider the further question presented by the petition that this Court should also reverse the rule announced in the case of *Old Dominion Copper Co.* v. *Lewisohn.*

We respectfully submit that in view of the fact that this petitioner was admittedly a mere federal equity receiver without title of any kind to property or demands located outside of the jurisdiction of his appointment, there is nothing before this Court which justifies the granting of a writ of certiorari.

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

LOUIS B. EPPSTEIN,
IRA W. HIRSHFIELD, and
LOUIS J. ALTKRUG,
Of Counsel.

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SEP 28 1

CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1934.

No. 11.

GEORGE W. McCANDLESS, as Receiver of DUQUESNE GAS CORPORATION,

Petitioner,

AGAINST

MAXIME H. FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION and CHAUCER CORPORATION.

Brief on Behalf of the Defendants Below, Respondents in This Court.

LOUIS B. EPPSTEIN,
IRA W. HIRSHFIELD,
LOUIS J. ALTKRUG,
Of Counsel.

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AGAINST

MAXIME H. FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION and CHAUCER CORPORATION.

Brief on Behalf of the Defendants Below, Respondents in This Court.

The order allowing certiorari limits it "to the questions pertaining to the validity of the appointment of the Petitioner as Ancillary Receiver, and his right as such to maintain this suit" (R., 74). We will therefore confine our discussion to the scope of that order.

Statement.

George W. McCandless was appointed Receiver of Duquesne Gas Corporation by the United States Dis-

trict Court for the Western District of Pennsylvania upon two bills: One filed by the Trustee under a mortgage trust indenture securing an issue of bonds and the other filed by a stockholder of Duquesne Gas Corporation.

The Duquesne Gas Corporation was duly served, the suits were consolidated and the corporation filed its answers and consented to the appointment of a Receiver by that Court.

The proceedings in the United States District Court for the Southern District of New York on the basis of which the Petitioner was appointed Ancillary Receiver of the Duquesne Gas Corporation in and for the Southern District of New York consisted of a petition by George W. McCandless, as Receiver, reciting certain of the proceedings had in the United States District Court of the Western District of Pennsylvania, attaching copies of the pleadings filed in that Court and copies of the orders made in that Court, and asking for the appointment here of an Ancillary Receiver of the corporation in and for the Southern District of New York (R., 17-52).

No independent bill of complaint was filed in the United States District Court for the Southern District of New York. No process of any kind was prayed for or issued. The corporation did not answer or appear. The proceedings were wholly *ex parte*.

Upon this application George W. McCandless was appointed Ancillary Receiver, filed the bond provided for in the order appointing him and proceeded to bring this suit.

POINT I.

The order of the United States District Court for the Southern District of New York purporting to appoint George W. McCandless Ancillary Receiver was absolutely void.

THERE WAS NOTHING BEFORE THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK UPON WHICH ITS JUDICIAL POWER COULD ACT.

The question here presented concerns the power of the United States District Court for the Southern District of New York to act under the above state of facts.

It becomes necessary therefore to consider the nature and extent of the judicial power vested in United States Courts, and particularly in the District Courts of the United States, and their relations to one another. The District Courts of the United States acquire their judicial power from the Constitution of the United States and from the acts of Congress enacted pursuant thereto.

The Applicable Provisions of the Constitution.

Article III, Section 1 of the Constitution, provides in part:

> "The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish * * *."

Article III, Section 2 of the Constitution provides:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases

of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."

The Applicable Provisions of the Acts of Congress.

Congress has established various inferior federal courts, among them being the District Courts. Section 24 of the Judicial Code (28 U. S. C. A., Sec. 41) provides, among other things with which we are not here concerned:

> "The District Courts shall have original jurisdiction as follows:
>
> (1) * * * Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 and * * * (b) is between citizens of different States."

Congress has granted to the United States District Court for the Western District of Pennsylvania, original jurisdiction to exercise such judicial power in the following territory:

> "The western district (of Pennsylvania) shall include the territory embraced on the 1st day of July, 1910, in the counties of Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forst, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Somerset, Venango, Warren, Washington, and Westmoreland." (Sec. 103, Judicial Code; 28 U. S. C. A., Sec. 184.)

It has granted to the United States District Court for the Southern District of New York original jurisdiction to exercise such judicial power in certain other territories, namely:

> "The southern district (of New York) shall include the territory embraced on the 1st day of July, 1910, in the counties of Columbia, Dutchess, Greene, New York, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester, with the waters thereof." (Sec. 97, Judicial Code; 28 U. S. C. A., Sec. 178.)

It now becomes important to determine just what is meant by the terms "judicial power", "cases", "controversies" and "suits".

This Court has defined these terms in many cases, among others:

Marbury v. *Madison,* 1 Cranch 137;
Cohens v. *Virginia,* 6 Wheat. 264;
Osborn v. *Bank of United States,* 9 Wheat. 738, 819;
Muskrat v. *United States,* 219 U. S. 346;
New Jersey v. *Sargent,* 269 U. S. 328;
Liberty Warehouse Co. v. *Grannis,* 273 U. S. 70;
Fidelity Nat. Bank v. *Swope,* 274 U. S. 123;
Willing v. *Chicago Auditorium,* 277 U. S. 274;
Ex parte Bakelite Corp'n, 279 U. S. 438;
Old Colony Tr. Co. v. *Commissioner,* 279 U. S. 716;
Nashville, C. & St. L. Ry. Co. v. *Wallace,* 288 U. S. 249.

See also:

Re Pacific Ry. Com'n, 32 Fed. 241, 255.

In the case of *Muskrat* v. *United States, supra,* at page 356, this Court uses the following language:

> "It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and, with the aid of appropriate legislation, upon the inferior courts of the United States. 'Judicial power,' says Mr. Justice Miller, in his work on the Constitution, 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.' Miller, Const. 314.
>
> "As we have already seen, by the express terms of the Constitution, the exercise of the judicial power is limited to 'Cases' and 'Controversies'. Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.
>
> "What, then, does the Constitution mean in conferring this judicial power with the right to determine 'cases' and 'controversies'. A 'case' was defined by Mr. Chief Justice Marshall as early as the leading case of *Marbury* v. *Madison,* 1 Cranch, 137, 2 L. ed. 60, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term 'controversy'? That question was dealt with by Mr. Justice Field, at the circuit, in the case of *Re Pacific R. Commission,* 32 Fed. 241, 255. Of these terms that learned justice said:
>
> " 'The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. *Chisholm* v. *Georgia,* 2 Dall. 431, 432, 1 L. ed. 445, 446, 1 Tucker's Bl. Com. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for de-

> termination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.' "

Later, in the same opinion, at page 358 this Court quotes the following from the opinion of Chief Justice Marshall in *Osborn* v. *Bank of United States,* 9 Wheat. 738, at page 819:

> "This clause (Article III of the Constitution) enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States, when any question respecting them shall assume such a form, that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States."

Bearing in mind the foregoing definition of judicial power and the limitations placed upon the exercise of such power by federal courts, we insist that there was not before the United States District Court for the Southern District of New York in the proceeding relating to the appointment of Petitioner as Ancillary Receiver a single one of those jurisdictional requirements which are prerequisite to the exercise of judicial power.

1. There was no complainant before that Court asserting his right against anyone.

2. There being no parties before that Court, there obviously could be no diversity of citizenship such as is required to confer jurisdiction upon that Court.

3. There was no suit instituted or pending in that Court.

1. There Was no Complainant Before That Court Asserting His Right Against Anyone.

The only person who was involved in that proceeding was George W. McCandless, a mere federal Chancery Receiver appointed by the United States District Court for the Western District of Pennsylvania who had no right, title or interest in or to the assets of the Duquesne Gas Corporation except such as arose out of the order of his appointment.

That a mere federal Chancery Receiver has no extra-territorial power of official action—none that exists by virtue of his appointment—none that the Court appointing him has power to confer upon him—is now the well recognized law of the land.

Booth v. *Clark,* 17 How. 322;
Hale v. *Allinson,* 188 U. S. 56;
Great Western Min. & Mfg. Co. v. *Harris,* 198 U. S. 561;
Sterrett v. *Second Nat. Bank,* 248 U. S. 73;
Moore v. *Mitchell,* 281 U. S. 18.

Of course, it is not true that all Receivers appointed by courts of equity have no extra-territorial power of official action.

In many states, such as Delaware, New Jersey, Minnesota, etc., statutes have been enacted providing that a Receiver of a corporation organized under the laws

of such state, when appointed by the courts of that state, becomes vested with title to the corporation's property as a *quasi assignee* or trustee.

Such state Receivers, acting in their capacity of *quasi assignees* or trustees or successors to the rights of the corporation, have been held to have power to sue in the courts of other States as well as in the federal courts for the purpose of asserting their rights as such assignees, trustees and successors to the rights of the corporation; but this Court has made it abundantly clear that in sustaining the rights of such a Receiver to assert such rights, the person acting as Receiver was not suing as a mere equity Receiver but rather in the capacity of *quasi assignee,* trustee or successor to the rights of the corporation. The designation of himself as Receiver in the title of the cause has been held to be *descriptio personnae* merely.

> *Bernheimer* v. *Converse,* 206 U. S. 516;
> *Converse* v. *Hamilton,* 224 U. S. 243;
> *Oakes* v. *Lake,* 290 U. S. 59.

Congress, however, has never enacted any laws so extending the powers or rights of mere federal equity Receivers as to authorize them to act beyond the jurisdiction of their appointment except to a very limited extent, although the question of extending such powers or rights has been presented to Congress by several bills.

In the Second Session of the 71st Congress several bills were introduced—(H. R. 9997, 9998, 9999 and 10000)—the purpose of which was to grant certain extra-territorial powers to federal equity Receivers in all of the judicial circuits of the United States. These bills failed to pass.

In Section 56 of the Judicial Code (36 Stat. 1102, 28 U. S. C. A. 117), Congress has provided a method by

which the powers of federal Receivers might be extended where land, or other property of a fixed character, the subject of the suit, lies within different States but in the same judicial circuit in which the Receiver is appointed. However, even in this Act, Congress has very carefully pointed out the exact procedure to be followed before a Receiver may obtain this very limited extension of power and this Court in *Lion Bonding & Surety Co.* v. *Karatz,* 262 U. S. 77, held that Section 56 of the Judicial Code did not apply to the assets of an insurance company but related only "to those cases where the fixed property is a unit, extending into several States, like interstate railroads and pipe lines." *Lion Bonding & Surety Co.* v. *Karatz, supra,* at page 87.

In Section 2 of the Bankruptcy Act of 1898 (11 U. S. C. A. 11) the District Courts of the United States are made courts of bankruptcy and subsection 20 thereof confers on them the power to "exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a Receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy."

It will be noted also that under the federal law judgments and decrees rendered in a District Court of the United States within any State are liens only on property throughout such State to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such State (25 Stat. 357; 37 Stat. 311; 28 U. S. C. A. 812) and all writs of execution upon judgments or decrees obtained in a district court, other than judgments obtained for the use of the United States may run and be executed only in the State in which the district lies (R. S. Secs. 985, 986; 28 U. S. C. A., Secs. 838, 839).

So far as we know these are the only Acts of Congress upon this subject.

We respectfully insist that, under all of the decisions of this Court, when Mr. McCandless came into the Southern District of New York, he had no power of official action respecting the property or claims of Duquesne Gas Corporation in this jurisdiction. Therefore he could not become an actor in any suit or proceeding in this State. He was not a party aggrieved. 3, Street, "Federal Equity Practice", Section 2695. *The Wabash,* 296 Fed. 559, 562.

The rule so often reiterated by this Court in *Booth* v. *Clark, Hale* v. *Allinson, Great Western Min. & Mfg. Co.* v. *Harris, Sterrett* v. *Second Nat. Bank and Moore* v. *Mitchell, supra,* that it has now become the well settled law of the land that mere federal equity Receivers have no official power beyond the jurisdiction of the Courts appointing them is based upon the recognition of the fact that each district court of the United States is a creature of Congress, that it has jurisdiction only to the extent to, and in the territory in, which jurisdiction has been conferred upon it by Congress and that only Congress has the power to extend that jurisdiction beyond such territory.

2. There Being no Parties Before That Court, There Obviously Could Be no Diversity of Citizenship Such as Is Required to Confer Jurisdiction Upon That Court.

No extended discussion of this is necessary.

3. There Was no Suit Instituted or Pending in That Court.

There was no bill of complaint filed in the United State District Court for the Southern District of New York. No process of any kind was prayed for or issued.

The corporation did not appear. It is so obvious that there was no suit before that Court upon which it could exercise original jurisdiction that we consider extended discussion unnecessary.

Unless therefore the United States District Court for the Southern District of New York had somewhere acquired the power to exercise summary ancillary jurisdiction auxiliary to that of the United States District Court for the Western District of Pennsylvania, it obviously had no jurisdiction to make the order appointing an Ancillary Receiver in this proceeding (R., 50), and such order is, therefore, absolutely null and void.

General Discussion.

We are not compelled to rely upon the general principles hereinbefore discussed to establish our contentions. The identical question here presented has been passed upon by many courts of the highest standing.

In the case of *Mercantile Trust Co.* v. *Kanawha & O. Ry. Co.*, 39 Fed. 337, a proceeding very similar to the one in the case at bar was instituted, the main difference being that in that case the proceedings were instituted by a party who could have filed an original bill.

Judge Harlan, speaking for the Court, after holding that the bill should be dismissed, categorically said that if the active intervention of the Federal Court in West Virginia was desired in respect to the mortgaged property located in West Virginia, it must be invoked by a separate independent bill.

The Court thereafter uses the following language:

> "It might be well if Congress would so enlarge or regulate the jurisdiction of the courts of the United States as to enable a circuit court in which is brought an original suit for the fore-

> closure of a mortgage resting upon an interstate railroad to take actual possession, by its officers, of the entire line, and of all the mortgaged property, wherever situated, and administer it for the benefit of all concerned; preserving in that mode the unity of the railroad, and the just rights of mortgagors, mortgagees, creditors, as well as those of the general public interested in commerce among the States. But there has been no such legislation, and we do not see our way clear to effect any such result by judicial orders merely" (p. 340).

A case on this subject much cited is that of *In re Brant,* 96 Fed. 257. In that case the Court said:

> "In this matter the petition is entitled '*Marcus M. Towle, Complainant* v. *American Building, Loan & Investment Society, Defendant,*' indicating the pendency here of a suit in equity. No such suit, however, has been brought in this court, and said title is erroneously employed. There is no defendant to the proceeding, but it is purely *ex parte,* and for this reason, namely, because no suit in equity is pending here, I hold that this court is without jurisdiction to appoint a receiver of any sort, either ancillary or original" (p. 257).

In the case of *Sullivan* v. *Swain,* 96 Fed. 259, the same Court held:

> "The original complainant, William K. Sullivan, who, on his *ex parte* petition, was appointed an ancillary receiver by this court prior to the institution of said suit, having since died, and the petition of one Henry Brant to be appointed successor to said Sullivan having been denied by an order this day entered *in Re Brant* (No. 722) 96 Fed. 257, for lack of jurisdiction, and the appointment of said Sullivan having, for the same reason, in the same order, been vacated, it follows that, in determining the question of

> jurisdiction in the pending suit, the suit must be considered as an independent suit for foreclosure, brought by a foregin receiver, and without any reference whatever to said appointment. Under these circumstances it seems to me that there is no escape from defendants' contention that, inasmuch as the matter in dispute is less than $2,000 this court is without jurisdiction. If it be conceded that the suit is one arising under the constitution and laws of the United States because brought by the receiver of a federal court, still the other requisite to federal jurisdiction, namely, that the amount involved must exceed $2,000, is lacking. It is true that where a receiver, in administering his trust, brings an action in the court which appointed him, such court has jurisdiction of the action without regard to the amount involved or the citizenship of the parties (*White* v. *Ewing,* 159 U. S. 36, 15 Sup. Ct. 1018; *Lanning* v. *Osborne,* 76 Fed. 319); but in such a case the jurisdiction is upheld on the ground that the action is but auxiliary to—indeed a part of—the original suit, in which the receiver was appointed. This ground of jurisdiction, however, manifestly does not exist where the receiver sues in a jurisdiction other than that of his appointment. The suit will be dismissed for lack of jurisdiction'' (p. 259).

In *Fairview Fluor Spar & Lead Co.* v. *Ulrich,* 192 Fed. 894, it appears that a citizen of Pennsylvania filed a verified *ex parte* bill in the Eastern District of Illinois, reciting among other things that he had previously filed a bill and amendment thereto in the Circuit Court for the District of Delaware against the ''Development Company'' and had secured the appointment and qualification of Ulrich and Joslyn as Receivers of the property of the Development Company and attaching the Delaware bill, its amendment, the decree appointing the Receivers and the Receivers'

bonds as exhibits thereto. Said bill contained other recitals showing the existence of property of the "Development Company" in Illinois, and requesting the Circuit Court for the Eastern District of Illinois to appoint Ulrich and Joslyn as Receivers of the Company in Illinois.

Thereafter, upon the verified bill and the several exhibits attached thereto, the lower court appointed Ulrich and Joslyn as Receivers of the assets of the defendant company with the usual powers of such Receivers. Such Ancillary Receivers qualified and brought suit in the Circuit Court of the United States for the Eastern District of Illinois to recover assets of the Development Company.

The Court in passing upon the power of the lower court to appoint Ancillary Receivers upon a mere *ex parte* bill, used the following language:

> "Here the original plaintiff was not made a party, nor was there any defendant named. Nor was any process prayed for. The proceeding lacked the essential features of a pending suit. There was nothing upon which the jurisdiction of the court could attach—nothing which could affect the rights or status of the defendants in the said amended bill. To them it was a nullity —something of which they were not bound to take notice. It in no way enlarged the powers of the foreign receivers as to the defendants to the amended bill. This being so, we are presented with the bald question whether foreign receivers having only the title acquired by the order of the court appointing them could maintain their suits in the Circuit Court of the United States for the Eastern District of Illinois, for there is nothing in the record to show that the receivers had any other title to the property of the Development Company than that derived from the order of the Delaware Court.
> • • •

> "We are of the opinion that the facts disclosed in the record bring this cause within the disapproval of the authorities; that the original *ex parte* proceeding in the Circuit Court of the United States for the Eastern District of Illinois was ineffectual to invest the foreign receivers with powers to act as receivers in said district; that the court was therefore without jurisdiction to entertain the subsequent proceedings in, or based upon, said cause; and that such want of jurisdiction is now presented in this record." (p. 897.)

In *Greene* v. *Star Cash & Package Car Co.*, 99 Fed. 656, an Ancillary Receiver of a corporation was appointed upon the *ex parte* application of a primary Receiver. A motion was made to vacate the order of appointment. The Court after referring to *Platt* v. *Philadelphia & R. R. Co.*, 54 Fed. 569 and *Mercantile Trust Co.* v. *Kanawha & O. Ry. Co.*, *supra*, vacated the appointment and said:

> "Here not only is no suit pending in this jurisdiction, but the application for appointment of the ancillary receiver is not made by Lakin, the only party seeking relief in the Circuit Court in West Virginia. This bill is filed by the receiver appointed in that suit, who is merely an officer of the West Virginia Court, who is not aggrieved, and who is not seeking any relief." (p. 656.)

It is true that the Court in its opinion gave as an additional reason the charge that the corporation had been deceived as to the pendency of the primary suit for the appointment of the primary Receiver.

It is significant, however, that the order was vacated. Certainly, if the Ancillary Receiver had been appointed in a pending suit, after due notice to the corporation and upon a proper showing of the facts, the fact that

certain improprieties had occurred in another jurisdiction could not have been the basis of vacating the order of appointment.

See also:

Pressley v. *Harrison,* 102 Ind. 19;
Baker v. *Backus' Adm'r,* 32 Ill. 96;
Bank v. *Circuit Judge,* 43 Mich. 296;
Jones v. *Schall,* 45 Mich. 380;
2 Beach, Mod. Eq. Prac., Section 721;
2 Daniell, Ch. Pl. & Prac. (6th Ed.) page 1734;
3 Street "Federal Equity Practice", Sections 2542, 2694-2695;
C. W. Wickersham, "Primary and Ancillary Receiverships", 14 Virginia Law Review, 599, 601.

Concerning the Petitioner's Argument.

In his brief, the Petitioner says: (p. 6) "The opinion of the Court below contains the following statement of its reason for declaring petitioner's appointment as Ancillary Receiver void;

> 'Thus, upon the petition alone of a foreign federal receiver, an ancillary receiver is appointed, where no bill had been filed in the jurisdiction by any party aggrieved praying for such relief. No process was issued in this jurisdiction and there has been no appearance or answer filed by the corporation within the district (R. 72). * * *
>
> 'Ancillary proceedings are independent suits and there must be a plaintiff and a defendant and the first must be one who claims injury committed by the defendant. * * * The appointment of the plaintiff as ancillary receiver was void, and he did not acquire, in any of the proceedings, a status to warrant the institution of this suit.' " (R. 73.)

Thus the Court below summarized the position of the Respondents herein.

Petitioner, however, asserts: (Page 7 of Petitioner's brief)

> "A conclusion opposite to that reached by the Court below has been arrived at by the Circuit Court of Appeals in the other Circuits in which the question has come up for decision, viz. the Third, Fourth, Eighth and Ninth Circuits. See *Mitchell* v. *Maurer,* 69 Fed. (2nd) 233 (C. C. A. 9th, 1934); *Ward* v. *Foulkrod,* 264 Fed. 627 (C.C.A. 3rd, 1920); *Coal & Iron Ry. Co.* v. *Reherd,* 204 Fed. 859, 882 (C.C.A. 4th, 1913); *Rust* v. *United Water Works Co.,* 70 Fed. 129 (C.C.A. 8th, 1895)."

It will be noticed that the Petitioner has made the most intensive research into the decisions concerned with the rule announced in the case of *Booth* v. *Clark,* and others, (see Petitioner's brief, pp. 22-23). We must assume that the cases here presented represent the most favorable in support of Petitioner's views that can be found.

But an examination of the cases cited by the Petitioner discloses the fact that none of them are authority upon the question here discussed.

Let us analyze them:

In the case of *Rust* v. *United Water Works Co.,* 70 Fed. 129, of the cases cited by Petitioner, the first in point of time, decided by the Circuit Court of Appeals of the Eighth Circuit, an action had been brought in the Circuit Court of the United States for the District of Colorado by the United Water Works Co. against the American Water Works Company, a New Jersey corporation, to recover a judgment for the sum of $118,512.50.

Prior to the commencement of this action, a Receiver was appointed of the American Water Works Com-

pany in a suit brought in the Court of Chancery of the State of New Jersey. After the entry of the judgment in the Colorado suit, the New Jersey Receiver filed a petition in the Colorado suit to vacate the judgment and for leave to interpose pleas to the jurisdiction of the Court, and defenses to the recovery the judgment evidenced.

Under the laws of the State of New Jersey Receivers of New Jersey corporations appointed by the Chancery Courts of that State become "the trustee for its creditors and stockholders, the successor to its rights and interests under the provisions of its charter." (p. 137).

To dispose of the effect of this authority upon the questions here discussed, it is only necessary to quote the last paragraph of the decision of the Court at page 137:

> "The result is that the receiver of the property of the American Waterworks Company, the trustee for its creditors and stockholders, the successor to its rights and interests under the provisions of its charter, proved to the court below that a judgment had been rendered against that corporation for $118,512.50, without a legal service of any summons or notice upon it, in a court in which the defendant in error was forbidden by an act of congress to sue it, and prayed that the execution upon the judgment might be stayed, that the judgment might be set aside, and that he might be admitted to specially or otherwise plead and prove these facts, and such other defenses as the corporation had to this action. These facts furnish ample grounds, in our opinion, to entitle the plaintiff in error to the relief sought by his petition."

This Receiver was not a mere chancery Receiver. He was a quasi assignee, a party aggrieved.

Of course, this Receiver had the right to sue anywhere. Bernheimer v. *Converse,* 206 U.S. 516.

In *Ward* v. *Foulkrod,* 264 Fed. 627, decided by the Circuit Court of Appeals of the Third Circuit in 1920, a stockholders' action was brought against a Delaware corporation in the Delaware State Court in which the appointment of receivers was prayed for. Thereafter and while the Delaware State Court action was pending, a creditors' bill was filed against the Delaware corporation in the United States District Court for the Eastern District of Pennsylvania and Foulkrod was appointed Receiver and thereupon took possession of all of the property of the corporation within the jurisdiction of the Court appointing him. The property of the corporation in Pennsylvania consisted in large part of real estate located in that State. Thereafter Receivers were appointed in the Delaware State Court action and, after qualifying, they filed a petition in the District Court of the United States for the Eastern District of Pennsylvania, reciting the proceedings pending in the two courts and praying that the District Court annul its order appointing a Receiver and directing its Receiver to turn over to the Delaware Receivers all the property of the corporation in his hands. This petition was denied on the ground that the exception to the rule relating to the right of Receivers as quasi assignees of the property of a corporation to bring suit anywhere does not extend to a Receiver who, as under the Delaware law, Section 3884 of the Revised Code, is vested with the corporation's title to personal property (everywhere) but not with its title to real property (beyond the jurisdiction of the State). This exception did not extend to such a Receiver the right to have the corporation's property *of both kinds* unconditionally surrendered to him by a court foreign to

that of his appointment, as broadly demanded by the petition of the State Receivers in the *Ward* case. (The words in parentheses are supplied by us.)

We call attention to the fact that this Receiver was a successor to the rights and property of the corporation wherever situated, except real estate situated in a foreign State. Of course, this Receiver was not a mere chancery Receiver. Except as to real estate located outside of the State of Delaware, he acquired title to all of the property of the corporation.

In *Mitchell* v. *Maurer,* 69 F. (2nd) 233, decided by the Circuit Court of Appeals for the Ninth District, the Chancellor of the State of Delaware had appointed three Receivers of a Delaware Corporation in a suit pending before him. These three Receivers filed a bill of complaint in the United States District Court for the Southern District of California for the ascertainment of the indebtedness of the corporation to the creditors in California, for the administration of its assets there and for the transmission of the net balance of its assets and property to the Delaware Chancery Court. Ancillary Receivers were thereafter appointed, the validity of whose appointment was sustained.

However, under Section 3884 of the Revised Code of Delaware, a Receiver of a Delaware corporation appointed by a Delaware Court of Chancery is vested, as a quasi assignee, with title to the corporation's property of every kind except real estate situated outside the State.

These Receivers were not mere chancery Receivers. They were quasi assignees. They were parties aggrieved. There can be no question but that this Receiver had the right to appear in the State of California as an actor and was entitled to be recognized by that Court.

In the case of *Coal & Iron Ry. Co.* v. *Reherd,* 204 Fed. 859, it appears that five partners filed a bill of complaint in the Circuit Court of Virginia against the sixth partner for the dissolution of a partnership and secured the appointment of one of their number, P. W. Reherd, as Receiver of the partnership.

This Receiver brought suit against the defendant, Coal & Iron Railway Company, in the Federal Court in the State of West Virginia on the 21st day of March, 1904. Thereafter, on the 15th day of January, 1906, *the same complainants* in the Virginia State Court action filed an ancillary bill in the Circuit Court of Randall County, West Virginia, *against the same defendant* in the Virginia action. Peter W. Reherd, the primary Receiver, was appointed Ancillary Receiver by the West Virginia state court with authority to intervene and prosecute the course of action asserted in the pending suit, as party plaintiff. The intervention took place and the plaintiff recovered judgment.

The question decided in that case was whether the procedure adopted by the Ancillary Receiver in intervening in the pending suit, instead of instituting a new suit, was a fatal defect. The Court held that although the proceeding was irregular, yet when the plaintiff came into the United States Court in West Virginia under the order of the West Virginia Court, he constituted himself a party to the pending suit, and the pleadings and subsequent proceedings having been made to conform, that that in effect was the commencement of the suit *de novo.*

Plaintiff also in his brief refers to three other cases:

Shinney v. *North American Savings, Loan & Building Co.,* 97 Fed. 9;
Seested v. *Bonfils,* 33 Fed. (2nd) 185;
Bluefields S.S. Co. v. *Steele,* 184 Fed. 584.

In the *Shinney* case, *supra,* one Graves was appointed Receiver of a Minnesota corporation by a State Court of Minnesota. Thereafter, in a suit pending against the corporation in the Circuit Court for the District of Utah, in which suit a bill of complaint was filed, the defendant corporation was regularly served with process, appeared and answered the complaint and the Minnesota Receiver filed a petition asking that he be appointed Receiver of the assets of the defendant corporation within Utah and that such receivership be ancillary to the primary administration of the State Court of Minnesota. He was thereafter appointed Ancillary Receiver.

Shinney, a creditor of the Minnesota corporation, brought an action against that corporation, its Receiver, and the Norwich Union Fire Insurance Co. in the State Court of Utah. The Receiver removed the suit to the District Court and the plaintiff thereupon moved to remand on the ground, among others, that the suit wherein Graves was appointed Receiver in Utah did not give the Court jurisdiction to appoint a Receiver. No attack was made in that suit on the propriety of the filing of the petition by the Minnesota Receiver. The sole question was whether the Circuit Court in Utah had jurisdiction to appoint a Receiver in the suit then pending before it. Upon that point the Court held:

> "The propriety of the original appointment of a receiver, or of the appointment of defendant Graves as ancillary receiver, is not material here, if jurisdiction to make the appointment existed. That a general power exists to appoint a receiver of the assets of a foreign corporation within the jurisdiction of the court appointing is well settled. *Williams* v. *Hintermeister,* 26 Fed. 889; *Murray* v. *Vanderbilt,* 39

> Barb. 140; *Trust Co.* v. *Miller,* 33 N.J. Eq. 155; 5 Thomp. Corp. Sec. 6860, 6861. And the case of *Buswell* v. *Order of Iron Hall,* 161 Mass. 224, 36 N.E. 1065, is a precedent for the appointment here made. Jurisdiction of the person is unquestioned. The corporation was regularly served with process, appeared, and answered the complaint, and has never objected to the jurisdiction. The appointment of a receiver was a part of the relief expressly sought in the suit, and there was an attempt to state a cause of action therefor. If, for the purposes of the argument, it were admitted that the complaint did not state a good cause of action, or affirmatively showed that the plaintiff was not entitled to the relief prayed, the jurisdiction would still exist. An appointment on such a bill would be erroneous, but in no sense void. The action of the court being property invoked, its determination would not be void for want of jurisdiction, so long as it was within the issues tendered. *Reynolds* v. *Stockton,* 140 U.S. 254-269, 11 Sup. Ct. 773; *Moore* v. *Martin,* 38 Cal. 428; *Ricketts* v. *Spraker,* 77 Ind. 371; *In re Latta,* 43 Kan. 533, 23 Pac. 655; *Young* v. *Lorain,* 11 Ill. 624; Van Fleet, Coll. Attack, Sec. 61." (p. 10.)

Certainly a chancery Receiver can be appointed only in a pending suit. In the *Shinney* case there was a bill of complaint filed, the corporation was duly served with process and it appeared and answered the bill of complaint. That is the only method by which a federal chancery Receiver, original or ancillary, may be appointed.

In *Seested* v. *Bonfils, supra,* one of two judgment creditors of a Missouri corporation had previously caused a Receiver of that corporation to be appointed in a state court of Missouri, on the ground of insolvency.

These judgment creditors filed a bill in the District Court of the District of Colorado in which they prayed for the appointment of an Ancillary Receiver to recover the property of the Missouri corporation which had been unlawfully removed out of Missouri to Colorado in fraud of creditors, pay off local creditors and pay the remainder over to the Missouri Receiver to the end that their judgments might be satisfied.

The defendant moved to dismiss the bill on the ground, among others, that the Missouri court lacked jurisdiction to appoint the primary Receiver.

As to this, the Court said (p. 186):

> "The statement discloses that the judgment, appointment of the receiver, the orders issued, and other proceedings in the Missouri court, are based upon personal service, and, being properly authenticated, are conclusive upon us, and cannot be here attacked collaterally."

This seems to have been an ordinary suit for the appointment of an Ancillary Receiver by proper parties. Its bearing on the case at bar is difficult to discern.

There can be no question but that this Court had jurisdiction.

In *Bluefields S.S. Co.* v. *Steele, supra,* the complainant, Fred M. Steele, a citizen of the State of Illinois, filed a bill in the Circuit Court of the United States for the Eastern District of Pennsylvania against the defendant Bluefields Steamship Company, a corporation of the State of Louisiana. The bill contained allegations to show that the same complainant had filed a bill in the United States Circuit Court for the Eastern District of Louisiana against the same corporation on account of the various matters and things set up in said bill, and that one Elmer E. Wood had been appointed Receiver for the defendant by

that Court. The bill asked that a Receiver ancillary to the receivership in Louisiana be appointed.

The defendant appeared specially and objected to the proceedings on the ground that the suit was not brought in the district of the residence of either the plaintiff or the defendant. The defendant, however, also moved to dismiss the bill upon the merits.

The decision of the Circuit Court of Appeals in this case was to the effect that by appearing and moving to dismiss on the merits, the defendant had waived any question of lack of venue, citing a decision of this Court to that effect. The Court, however, held that the bill was defective in not setting forth facts sufficient to justify the appointment of an Ancillary Receiver and reversed the case upon that ground.

In the *Bluefields* case, *supra,* certain *obiter dicta* can be found to the effect that certain of the jurisdictional requisites of a suit are not essential in a proceeding to secure the appointment of an Ancillary Receiver. From the foregoing statement, it is very clear that this question was not before the Court for decision. We cannot believe that the Court in making that statement took into consideration the constitutional limits on the exercise of judicial power. Had these questions been before that Court, we are confident that it would not have used the language employed in this *obiter dicta.*

The complainant also refers to *Walker* v. *United States Light & Heating Co.,* 220 Fed. 393, but that decision merely holds that the defendant corporation, having once consented to the appointment of a Receiver upon the application of a simple contract creditor, was estopped in another suit from objecting to the appointment of an Ancillary Receiver by another simple contract creditor. It will be noted, however,

that in this case it is stated in effect that an independent bill is necessary to confer jurisdiction upon a federal court to appoint such Ancillary Receiver.

It is quite true that in the opinions of the various courts above referred to there can be found much *obiter dicta* relating to the rights of foreign Receivers to sue. This *dicta* should, however, be construed in connection with the issues before the Court in each case. For instance, in those cases in which state chancery courts had appointed Receivers over corporations organized under the laws of such states and such Receivers, who, under the laws of such states, succeed to the title of the corporation in its property, were asserting rights, the statement of the court to the effect that foreign Receivers are entitled to bring certain actions and to commence certain proceedings must be construed to mean that such Receivers as have acquired title in the manner pointed out, have the right to institute such actions and take such proceedings.

However, there is no case cited by the Petitioner, nor is there any decision that we have found, which holds that an Ancillary Receiver can be appointed by a federal court upon the *ex parte* application of a mere foreign federal chancery Receiver, unless the case of *Platt* v. *Philadelphia & R.R. Co.,* 54 Fed. 569 so holds.

From the meager report of that case it appears that there was a bill filed, that there were appearances and argument before the Court. To that extent it was a suit. It does not appear whether the complainant was the primary Receiver. It merely holds that such appointments had been made *ex parte.* Nor was the order made intended to represent the final opinion of the Court upon the subject. In a short decision in

which the order offered with the bill was ordered entered, the Court says: (p. 569):

> "We will at present follow this practice, stating, however, that this is without prejudice to a *full consideration of the question if hereafter a motion is made to dissolve or annul the order.*" (Italics ours.)

Petitioner also cites a great number of decisions of State courts concerning the right of foreign Receivers to bring suits in the courts of such States (Petitioner's Brief, pp. 22-23). An examination of these decisions shows that many of these actions were instituted by Receivers who under the laws of the State of their appointment were also quasi assignees.

Moreover, it must be borne in mind that the jurisdiction of State Courts is not subject to the limitations which the Constitution of the United States has imposed upon the jurisdiction of federal courts.

State courts, as a rule, have original jurisdiction not only in cases, controversies and suits, but in proceedings plenary and summary.

The jurisdiction in civil matters of federal courts, however, is so limited that the judicial power can be exercised only in suits.

Finally, upon this subject we call attention to the language of Mr. Justice Day in *Great Western Min. & Mfg. Co.* v. *Harris, supra* (p. 578):

> "There are numerous and conflicting decisions in the state courts as to the rights of a receiver to sue in a foreign jurisdiction upon principles of comity, which it is not necessary to review here. In this court, since the case of *Booth* v. *Clark,* 17 How. 338, 15 L. ed. 170, we deem the practice to be settled, and to limit a receiver who derives his authority from his appointment as such, to actions, either in his own name or

that of an insolvent corporation, such as may be authorized within the jurisdiction wherein he was appointed."

FROM THE FOREGOING ANALYSIS OF THE CONSTITUTIONAL LIMITATION UPON THE EXERCISE OF THE FEDERAL JUDICIAL POWER, IT SEEMS TO US TO BE SELF-EVIDENT THAT, (A) SINCE A MERE FEDERAL CHANCERY RECEIVER'S POWER TO SUE IS LIMITED TO SUITS BROUGHT WITHIN THE JURIDICTION WHEREIN HE WAS APPOINTED, AND (B) SINCE THE JUDICIAL POWER OF FEDERAL COURTS CAN BE EXERCISED ONLY IN SUITS BROUGHT IN THE FORM PRESCRIBED BY LAW:

(1) A MERE FEDERAL CHANCERY RECEIVER CANNOT INVOKE THE JUDICIAL POWER OF A FOREIGN FEDERAL COURT IN ANY MANNER WHATSOEVER, AND

(2) NO ONE CAN PROCURE THE APPOINTMENT OF AN ANCILLARY RECEIVER EXCEPT IN A PENDING SUIT BROUGHT IN THE MANNER PRESCRIBED BY LAW, AND

(3) THEREFORE, THE ORDER APPOINTING THIS PETITIONER ANCILLARY RECEIVER IS NULL AND VOID FOR WANT OF JURISDICTION.

POINT II.

The power of a United States District Court to appoint Ancillary Receivers in civil cases may be exercised only in a pending suit.

As we have already seen, the terms of the Constitution and the acts of Congress, limit the exercise of the judicial power by District Courts in civil cases to suits at law and in equity. Beyond this it does not extend and unless it is asserted in a suit at law or in equity within the meaning of the Constitution

and the acts of Congress, the power to exercise it is nowhere conferred. *Muskrat* v. *United States, supra.*

By no stretch of the imagination can the proceedings instituted in this case for the appointment of an Ancillary Receiver be considered a "suit" within the meaning of the Constitution or the acts of Congress made pursuant thereto.

The petitioner, however, contends that somehow, somewhere, the District Courts of the United States have acquired jurisdiction to appoint Receivers ancillary to Receivers in other courts without reference to this limitation upon their power.

Petitioner, in effect, contends that if any Court of the United States shall have acquired jurisdiction to appoint a Receiver and shall have appointed a Receiver in that case, all other District Courts in the United States can act summarily and appoint Ancillary Receivers upon the mere application of the primary Receiver, without notice to any one, without the filing of a bill of complaint and without the pendency of a suit.

We are at a loss to understand just where and how such jurisdiction was acquired.

That such power has never been expressly conferred by any act of Congress is certain.

That District Courts have the power in pending suits to appoint Receivers in their own jurisdiction and to require such Receivers to act in connection with and as auxiliary to so-called primary Receivers appointed in any foreign court is also certain.

The practice in federal, and state courts, of appointing Receivers in aid of receivership proceedings pending in foreign courts, federal or State, has resulted from the exercise of comity by such courts and is now very common.

However, it would seem too clear for debate that in order to exercise such power, courts must first acquire jurisdiction over something or somebody.

Congress undoubtedly has the power to ordain and establish the inferior courts of the United States. This power, however, can be exercised only within the Constitutional grant. In ordaining and establishing the district courts of the United States, except in certain instances which will be discussed hereafter, Congress has granted to them original jurisdiction in suits and nothing more.

It therefore appears that federal courts have the power (and they frequently exercise it) to appoint so-called Ancillary Receivers while acting within the scope of the jurisdiction conferred upon them.

Where the defendant is a corporation, this requires the institution of a suit by some one, a citizen of another state, who has acquired an interest in the property of the corporation such as a bondholder, a trustee for bondholders, a judgment-creditor or a stockholder in which suit the right or interest of such complainant in the property of the corporation is asserted and relief is prayed for. The District Court, having thus acquired jurisdiction, can, and usually does, make such orders as justice and the harmonious administration of the estate by different courts, requires. After enforcing local laws applicable to the administration of the assets under its control, the final disposition of what is left is usually committed to the court that first acquired jurisdiction.

There is therefore no necessity or sound reason for conferring upon the District Courts of the United States this summary power the exercise of which seems to be in direct conflict with the spirit of the Constitution of the United States. We respectfully

insist that there exists no power outside of Congress to grant it and Congress has not done so.

There is considerable confusion in certain *obiter* to be found in some of the decisions as to just what ancillary jurisdiction is.

The fact that Receivers appointed in aid of receivership proceedings pending elsewhere are generally called Ancillary Receivers has added to this confusion. The suits, in which such appointments are made, are in no sense ancillary suits.

Let us now see to what extent this Court has recognized the power of any federal court to exercise ancillary jurisdiction.

In *Babbitt* v. *Dutcher*, 216 U.S. 102, and in the cases there cited, this Court has held that Congress had granted to the federal district courts jurisdiction to entertain proceedings instituted by a trustee in bankruptcy, duly appointed in a bankruptcy proceeding in another district, to compel the officers of the bankrupt to deliver to the trustee the documents in their possession relating to the business of the bankrupt.

Subsequently, Congress added subdivision 20 to Section 2 of the Bankruptcy Act of 1898. Congress there provided that Courts of Bankruptcy would have the power to:

> "(20) exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy."

In this manner the ancillary jurisdiction of United District Courts in bankruptcy matters was created.

Again in *White* v. *Ewing*, 159 U.S. 36, 38, 15 Sup. Ct. Rep. 1018, this Court quotes the following from *Porter* v. *Sabin*, 149 U.S. 473, 479:

> "When a court exercising jurisdiction in equity appoints a receiver to hold the property of a corporation, *that court* assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the Court shall ultimately adjudge to be entitled to it." (Italics ours.)

Continuing, the Court says (p. 39):

> "The circuit court obtained jurisdiction over the Cardiff Coal & Iron Company by the filing of the original creditors' bill by Bosworth, a citizen of Massachusetts, and by the appointment of a receiver; and any suit by or against such receiver, in the course of the winding up of such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the circuit court, regardless either of the citizenship of the parties or of the amount in controversy."

Later, this Court says (p. 39):

> "Indeed, it was conceded that, where an insolvent corporation is placed in the hands of a receiver of the circuit court, such appointment draws to the jurisdiction of *that court* the control of its assets, so far as persons having claims to participate in the distribution of such assets are concerned, and that parties must go into *that court* in order to assert their rights, prove their demands, and receive whatever may be due them, or their share or interest in the estate." (Italics ours.)

In considering the effect of these decisions, it must be borne in mind, first that the jurisdiction of bankruptcy courts is not limited to suits as is the jurisdiction of the District Courts in civil cases. It is true that the District Courts of the United States are named among others as Courts of Bankruptcy but the jurisdiction conferred upon them as Courts of Bankruptcy is very comprehensive, and extends to summary proceedings of many kinds (Section 2, Bankruptcy Act of 1898); and second, that the decisions of this Court recognizing the existence of ancillary jurisdiction of courts in suits at law or in equity very definitely confines its exercise to the very court in which primary jurisdiction has been acquired.

Moreover, federal courts in different states, except where Congress has ordained otherwise, are foreign courts as to one another, just as fully as they are foreign courts to State Courts, and just as fully as State Courts are foreign courts to state courts of other states.

In *Horn* v. *Pere Marquette R. Co.,* 151 Fed. 626, in an opinion written by Lurton, Circuit Judge, we find a very definite statement on this subject (p. 631):

> "Federal Courts of different States are undoubtedly foreign courts as to each other in as full sense as are State courts of different jurisdictions."

The Court, however, states that that statement does not apply to federal courts in different districts but in the same State, and adds (p. 631):

> "That the jurisdiction of a particular Circuit Court is confined in general within the territorial limits of a judicial district may be conceded. *Toland* v. *Sprague,* 12 Pet. 300, 9 L. Ed. 1093; *Barrett* v. *United States,* 169 U.S. 218, 221, 18 Sup. Ct. 327, 42 L. Ed. 723."

The entire history of federal legislation upon this subject indicates in Congress a fixed determination to keep the jurisdiction of district courts in different states separate and distinct from one another. (See pages 9-10 *supra.*)

Moreover, the decisions of this Court in *Booth* v. *Clark, Hale* v. *Allinson, Great Western Min. & Mfg. Co.* v. *Harris, Sterrett* v. *Second Nat. Bank,* and *Moore* v. *Mitchell, supra,* implicitly negative the Petitioner's contention.

If the District Courts of the United States in different States have such ancillary jurisdiction as to one another, the appointment of an Ancillary Receiver is a mere formality. It is only because the District Courts of the United States in different States, in so far as they exercise judicial power conferred by Article III of the Constitution, are independent foreign courts, one of the other, that it became necessary for this Court to announce the doctrine found in the cases of *Booth* v. *Clark, Hale* v. *Allinson* and the other authorities cited above.

This Court has always looked, not to the form, but to the substance of matters brought before it for adjudication. If, then, the United States District Courts had the power to appoint Ancillary Receivers upon the *ex parte* application of a mere foreign federal Receiver, this Court would not have announced nor reiterated the rule announced in *Booth* v. *Clark* as it has so frequently done. It would undoubtedly have held that the acceptance of jurisdiction by a district court of the United States, of a suit brought by a foreign federal Receiver, was tantamount to the appointment of such foreign Receiver as Ancillary Receiver by that court in that case.

WE INSIST THAT THE PROBLEM IS MUCH MORE SUBSTANTIAL THAN THAT. IT IS FUNDAMENTAL. IT INVOLVES THE VERY POWER OF THE COURT TO ACT, NOT THE FORM IN WHICH IT ACTS.

The decisions in these cases are based upon the recognition by this Court of the fact that the United States District Courts in different States have no such relation to one another as the Petitioner is here contending for; that they have no jurisdiction in civil cases, except to hear and determine suits brought in those courts in the manner prescribed by law; and that therefore an Ancillary Receiver cannot be appointed except in a pending suit.

For the foregoing reasons, we respectfully insist that the order of the United States District Court of the Southern District of New York purporting to appoint this Petitioner Ancillary Receiver was absolutely void, that under that order he acquired no rights or powers of any kind, and that therefore he has no right to maintain this suit.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be affirmed with costs.

New York, September 24, 1934.

Respectfully submitted,

LOUIS B. EPPSTEIN,
IRA W. HIRSHFIELD,
LOUIS J. ALTKRUG,
Counsel.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 11.

GEORGE W. McCANDLESS, as Receiver of Duquesne Gas Corporation,

Petitioner,

—against—

MAXIME H. FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION and CHAUCER CORPORATION,

Respondents.

PETITION FOR REHEARING ON BEHALF OF MAXIME H. FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION AND CHAUCER CORPORATION, DEFENDANTS BELOW.

LOUIS B. EPPSTEIN,
Counsel for Respondents.

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Respondents.

Petition for Rehearing on Behalf of Maxime H. Furlaud, Kingston Corporation, Byron Corporation and Chaucer Corporation, Defendants Below.

To the Honorable Charles E. Hughes, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above-named defendants, Maxime H. Furlaud, Kingston Corporation, Byron Corporation and Chaucer Corporation, present this, their petition for a rehearing of the above-entitled cause.

I.

JURISDICTION.

The petition for certiorari in this cause was filed on March 28, 1934, and certiorari was granted on

April 30, 1934. This Court rendered its decision on November 5, 1934, reversing the judgment of the United States Circuit Court of Appeals for the Second Circuit and remanding the cause to it for the determination of the questions relating to the liability of the defendants.

This petition is filed within less than twenty-five days thereafter, under Rule 33 of the General Rules of the United States Supreme Court.

II.

Reasons for Petition for Rehearing.

THE RESPONDENTS CONTEND THAT THE QUESTION HERE INVOLVED IS:

> NOT WHETHER COMPLAINANT SIMPLY LACKED CAPACITY TO SUE; BUT WHETHER COMPLAINANT HAVING NO TITLE TO ASSETS WITHIN THE SOUTHERN DISTRICT OF NEW YORK WAS WHOLLY WITHOUT A CAUSE OF ACTION IN THIS CASE.

1. Complainant's petition for a writ of certiorari filed in this Court contains the statement that (p. 3):

> "Upon the appeal the defendants Maxime H. Furlaud and Kingston Corporation raised for the first time the question of complainant's title to sue"

and set out the action of the Court thereon.

2. Notwithstanding this statement in the petition, the order of this Court granting the writ of certiorari limited it:

> "to the questions pertaining to the validity of the appointment of the petitioner as ancillary

receiver, and his right as such to maintain this suit" (R. 74).

3. Upon the assumption that no other question would be considered by this Court the respondents limited the record and their briefs to these questions.

Respondents believe that they have demonstrated in their briefs that the order purporting to appoint complainant ancillary receiver of the Duquesne Gas Corporation (R. 50-52) was an absolute nullity, that the United States District Court for the Southern District of New York had no jurisdiction to make such order, and that by reason of this order no additional right, power or authority was conferred upon complainant.

4. This Court in its opinion did not discuss the issues provided for in its order, but instead based its decision solely upon the question of whether defendants in the lower court had properly raised the question of complainant's lack of capacity to sue.

5. The respondents contend not only that that issue was properly raised by the defendants in their answer in accordance with Equity Rule 30 as interpreted by this Court in *Grant* v. *Leach & Co.,* 280 U. S. 351, and in accordance with the decision of this Court in *Sterrett* v. *Second Nat. Bank,* 248 U. S. 73, affirming 246 Fed. 753, but that that was not the real issue involved. The actual issue in this case is whether the complainant, personally or in any capacity, had any title to or interest in the cause of action asserted against these defendants.

6. Nowhere in the opinion of this Court is any consideration given to the question urged by respond-

ents under the limited order granting the writ. The proposition for which respondents contend is:

> THAT THE UNCONTRADICTED TESTIMONY IN THIS CASE AND THE ADMISSIONS OF COUNSEL IN THE LOWER COURT, IN THE CIRCUIT COURT OF APPEALS AND IN THIS COURT, DEMONSTRATED THE FACT THAT COMPLAINANT IN THIS CASE HAD NO TITLE TO ASSETS IN THE SOUTHERN DISTRICT OF NEW YORK, AND, THEREFORE HAD NO CAUSE OF ACTION AGAINST DEFENDANTS.

Whether or not complainant had capacity to sue, if he were wholly without title to or interest in the cause of action asserted by him, the decision of the United States Circuit Court of Appeals should be affirmed.

7. Had respondents been advised that the question passed upon by this Court was to be considered, they would have prepared an entirely different brief and argument.

They would have insisted that the transcript of record in this Court include all of the testimony offered at the trial concerning the order made in the United States District Court for the Southern District of New York purporting to appoint complainant ancillary receiver, the action of the trial court in requiring the introduction of the entire file relating to that appointment as the best evidence and the motion to dismiss upon all the evidence made at the end of the trial by the respondents.

It is true that this Court, at page 4 of its opinion, footnote 3, refers to a part of this record, but considers it only in connection with its inquiry concerning the defendants' supposed contention that complainant merely lacked capacity to sue.

However, what we contend is that this testimony affirmatively established the fact that this complainant never acquired any title to the asserted cause of action. In other words, we might even concede that if this complainant had right, title or interest in this cause of action, either by reason of his original appointment or by the purported order of the United States District Court for the Southern District of New York, his mere lack of capacity to sue may not have been so urged in the lower court as to justify its consideration for the first time upon appeal. But we insist that if he had no title to the cause of action, if he had no right of action against the defendants, as is apparent in this case, that fact could be shown at any time. As stated in the case of *Sterrett* v. *Second Nat. Bank,* 246 Fed. 753, at page 758:

> "It follows that in the present state of the record the defendant is entitled to a dismissal of the suit, notwithstanding its apparent failure to call to the attention of the court below the proposition on which our decision is based; for, if plaintiff had no title and no right of action in the court below, that court was without power to render decree in his favor. * * * A defense that plaintiff had no title to the asserted right of action is always open."

8. The Court seems to attach some importance to the fact that respondents' counsel in the Circuit Court of Appeals urged that Court to pass upon the liability of the defendants to account even after the Court had indicated that it intended to reverse the decree of the District Court upon the grounds stated in its opinion.

This Court obviously was under the impression that counsel for the respondents intended to waive all other questions.

In fact, in the Circuit Court of Appeals, counsel in his brief raised four questions, the third of which was directed to the particular question here considered.

In the course of counsel's argument, he stated to the Circuit Court of Appeals that he did not waive any of the questions raised by him in his brief, and desired to be understood as insisting upon all of them but that he expected to confine his oral argument to one point; but he asked the Court to read and consider his brief on all of the other questions involved, and he received the express assurance from the Court that it would so do.

He did confine his argument to questions involving the merits until the Court asked him what his views were upon the question of complainant's title, to which his opponent had devoted almost his entire argument. Counsel for respondents then discussed that question at some length.

Filed herewith is a copy of the brief of respondents in the Circuit Court of Appeals for the Second Circuit, from Point III of which it will appear that respondents did not waive or intend to waive this question. He then felt and now feels that an ancillary receiver might at some time hereafter be legally appointed and the entire matter re-litigated and therefore urged that the Court should also pass upon the liability of the defendants to account, and finally dispose of the case.

Argument.

Respondents respectfully contend that the actual question here involved is, not whether a plaintiff having title to the subject matter of a suit and a cause of action either in his own right or in some repre-

sentative capacity was merely disabled to sue for want of capacity but, whether this plaintiff had any right, title or interest of any character in the subject matter of this suit.

There is no conflict between counsel as to what occurred in the United States District Court for the Southern District of New York, in the proceedings resulting in the order purporting to appoint an ancillary receiver. The record in and the order of that Court, purporting to appoint complainant ancillary receiver, disclose upon their face that the Court was without jurisdiction to make such order.

The plaintiffs in *Booth* v. *Clark,* 17 How. 322; *Sterrett* v. *Second Nat. Bank,* 248 U. S. 73; *Hale* v. *Allinson,* 188 U. S. 56, and *Great Western Min. & Mfg. Co.* v. *Harris,* 198 U. S. 561, were all without capacity to sue, so that if that had been the only question involved in those cases the decisions could not have been sustained. This was particularly true in the case of *Sterrett* v. *Second Nat. Bank, supra.* The Transcript of Record filed in this court in that case, at page 236, discloses the fact that the question was not raised by pleading, argument or otherwise from the time the suit was instituted on May 11, 1912 until October 8, 1917, when as counsel for appellant arose in the Circuit Court of Appeals to argue the appeal, adversary counsel verbally gave notice that he would rely in his argument on the case of *Great Western Min. & Mfg. Co.* v. *Harris, supra.*

In its opinion in this case, this Court points out the fact that the want of title in those cases was disclosed on the face of the complaint and that the complaints would have been bad on demurrer.

We respectfully insist that the defect as to title in this case also appears on the face of the complaint

and that the complaint in this case would have been bad on demurrer. In Paragraph Fourth of the amended bill of complaint (R. 3-4) it is expressly alleged "that upon petition of the complainant as such Receiver duly filed in the United States District Court, in and for the Southern District of New York, an order was duly made on the 23rd day of March, 1932, by said last mentioned Court appointing said complainant, George W. McCandless, as Ancillary Receiver of Duquesne Gas Corporation, which last mentioned order duly authorized the complainant, as such Receiver, to bring this suit * * *".

If as this Court has so often held, a mere equity receiver cannot sue in a foreign court and if as this Court has so often held, the judicial power of a district court can be exercised only in a pending suit, it must follow that the order so alleged to have been made, was absolutely void.

However, in this case the lack of title of complainant to the cause of action sued on was affirmatively shown by the proof of the complainant introduced in the lower court.

The file of the proceedings had in the United States District Court for the Southern District of New York was offered and received in evidence. (Transcript of Record, United States Circuit Court of Appeals, Second Circuit, fol. 223, p. 75.)

Respondents' motion to dismiss was in effect a demurrer to the evidence and by it the Trial Court was called upon to pass on the issues of law established by the evidence.

Suydam v. *Williamson,* 20 How. 427, 436;
Van Stone v. *Stillwell & Bierce Manuf'g Co.,* 142 U. S. 128.

Respondents now urge that the questions here involved are the following:

> 1. Complainant by his appointment as Receiver in the Western District of Pennsylvania acquired no title to assets or causes of action of any kind in the Southern District of New York.
>
> *Booth* v. *Clark, supra;*
> *Hale* v. *Allinson, supra;*
> *Great Western Min. & Mfg. Co.* v. *Harris, supra.*
>
> 2. Since the United States District Court for the Southern District of New York was without jurisdiction to make the order purporting to appoint the complainant ancillary receiver, that order was absolutely void and conferred upon him no title to assets in the Southern District of New York. Therefore, he had no title to or interest in the cause of action in this suit.

The rule that if a court acts without authority, its judgments and orders are regarded as nullities, that they are not voidable but absolutely void, has been recognized by this Court from the earliest time.

> *Elliott* v. *Peirsol,* 1 Pet. 328;
> *Wilcox* v. *Jackson,* 13 Pet. 498;
> *Thompson* v. *Whitman,* 18 Wall. 457;
> *Old Wayne Mut. L. Asso.* v. *McDonough,* 204 U. S. 8.

In all of the cases cited by this Court holding that mere lack of capacity to sue could not for the first time be raised upon appeal, the plaintiffs had title, legal or equitable, to the cause of action involved in

the suits. The infant suing to recover for personal injuries certainly had a beneficial interest in the recovery. The married woman suing for property belonging to her certainly had a beneficial interest in the cause of action. The foreign corporation bringing suit to quiet title certainly owned the property involved in that suit. The father bringing suit for the negligent death of his minor son certainly had an interest in the cause of action; and so, through all of the cases cited, there was no question of complete lack of title, legal or equitable. The sole question was lack of capacity to sue.

In this case the question urged by us is complete lack of title of complainant in the cause of action sued upon.

In our oral argument before this Court we conceded that if the United States District Court for the Southern District of New York had jurisdiction under the facts of this case to confer any right upon the plaintiff, our position was untenable. On the other hand we contended, and now contend, that if the order was absolutely void, if it was a nullity, it was as though it had never been made and, therefore, it conferred no new or additional right, title or interest upon complainant.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the United States Circuit Court of Appeals for the Second Circuit be, upon further consideration, affirmed.

Respectfully submitted,

LOUIS B. EPPSTEIN,
Counsel for Respondents.

Certificate of Counsel.

I, Louis B. Eppstein, counsel for Maxime H. Furlaud, Kingston Corporation, Byron Corporation and Chaucer Corporation, the above-named defendants, respondents herein, certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

LOUIS B. EPPSTEIN,
Counsel for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 11.

GEORGE W. MCCANDLESS, as Receiver of Duquesne Gas Corporation,
Petitioner,

against

MAXIME H. FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION and CHAUCER CORPORATION,
Respondents.

MEMORANDUM ON BEHALF OF PETITIONER GEORGE W. McCANDLESS, AS RECEIVER, ETC., IN OPPOSITION TO PETITION FOR REHEARING.

The case of *Sterrett* v. *Second National Bank,* which is referred to at several places in the petition for rehearing, merely held that "A defense that the plaintiff has no title to the asserted right of action is always open * * *" (246 Fed. 758). But the plaintiff in the instant case does not assert title or pretend to have it. The question arising here concerns merely the plaintiff's capacity to sue.

At page 4 the petition states that, if they had been advised that the question passed upon was to be considered, the respondents would have insisted upon a more ample transcript of record in this Court. Here and at page 8 they mention the motion to dismiss made at the end of the trial. But the petition does not state that there is a word in any part of the record below to indicate that the question of

the plaintiff's capacity to sue was ever suggested to the Trial Court. As to the motion to dismiss, it was general (page 182 of record below); the respondents did not suggest the question in connection with it. From the beginning to the end of the trial and upon the submission of briefs after the close of the trial, there was no suggestion of the question to the Trial Court; and this clearly appeared from the answers made by counsel to questions which were put by some of the Justices of this Court upon the argument.

Nor is it enough that there was a technical or constructive denial in the answer, since the question was not actually litigated *nisi prius*.

In *Kansas & A. V. Railway* v. *Dye*, 70 Fed. 24 (C. C. A. 8th 1895), the Court said (p. 26):

> "Parties on appeal must abide by the theories adopted by them in the trial court. They will not be allowed to change their base in the Appellate Court. The pleadings will be treated on appeal as the parties elected to treat them in the trial court."

See also:

First National Bank v. *Commonwealth of Kentucky*, 9 Wall. 353, 19 L. Ed. 701;

Wilson v. *McNamee*, 102 U. S. 572, 26 L. Ed. 234;

Davis v. *Fredericks*, 105 U. S. 4, 26 L. Ed. 938;

Cox v. *State of Texas*, 202 U. S. 446, 50 L. Ed. 1099;

Drexel v. *True*, 74 Fed. 12;

Bort v. *McCutcheon & Company*, 187 Fed. 798;

Arkansas Coal Company v. *Stokes*, 2 Fed. (2d) 511.

Nor could the validity of the complainant's appointment as ancillary receiver be collaterally attacked. In addition to the decisions to this effect cited at pages 25 and 26 of our main brief, we call the Court's attention to the decision of this Court in the following cases, which are, as are the cases cited in our main brief, unsuccessful attempts to assail collaterally the validity of the appointment of receivers or administrators:

Comstock v. *Crawford,* 3 Wall. 396, 18 L. Ed. 34;
McNitt v. *Turner,* 16 Wall. 352, 21 L. Ed. 341;
Simmons v. *Saul,* 138 U. S. 439, 34 L. Ed. 1054;
Shields v. *Coleman,* 157 U. S. 168, 39 L. Ed. 660.

See also:

Voorhees v. *Bank,* 10 Pet. 449, 9 L. Ed. 490;
Grignon v. *Astor,* 2 How. 319, 11 L. Ed. 283;
Sanger v. *Upton,* 91 U. S. 56, 23 L. Ed. 220.

We believe it is proper here to add that the situation presented by the instant case is quite different from that presented by the case of *Mitchell* v. *Maurer,* which is now pending decision in this Court, for in the latter case the validity of the appointment was immediately made the subject of a direct attack.

Respectfully submitted,

RALPH ROYALL,
Counsel for Petitioner
George W. McCandless.

SUPREME COURT OF THE UNITED STATES.

No. 11.—October Term, 1934.

George W. McCandless, as Receiver of Duquesne Gas Corporation, Petitioner,
vs.
Maxime H. Furlaud, et al.

On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 5, 1934.]

Mr. Justice Brandeis delivered the opinion of the Court.

McCandless, a citizen and resident of Pennsylvania, suing as ancillary receiver of the Duquesne Gas Corporation, appointed by the federal court for southern New York, brought this suit in that court. The bill alleged that he had been appointed receiver of all the assets of the Corporation in a consolidated suit in the federal court for western Pennsylvania originally brought by Frank T. Harrington against the Duquesne Gas Corporation, and later consolidated with one brought by the Central Hanover Bank and Trust Company, as trustee under the Corporation's mortgage; that upon his petition as primary receiver filed in the federal court for southern New York he had by an order "duly made" been appointed ancillary receiver there; that he had "duly qualified and is now acting as such ancillary receiver;" and that the "order duly authorized" him as such receiver to bring this suit. The bill then set forth at great length facts on which it charged that the defendants, or some of them, acting in a fiduciary relation to the Corporation came into the possession of funds arising from the sale of its securities and had misappropriated more than $2,500,000. An accounting and the recovery of these sums were prayed for. Furlaud, a citizen and resident of New York, and three corporations organized under the laws of states other than Pennsylvania were the defendants. Each filed an answer which denied most of the allegations of the bill.

The case was heard by the District Court on the merits, on evidence which occupied 217 pages of the original printed record.

That court entered a final decree which ordered Furlaud and the Kingston Company to pay the sum of $1,834,640.08 with interest and costs. Those defendants appealed to the Circuit Court of Appeals, denying liability. McCandless cross-appealed, claiming the additional sum of $850,000; and that the other two companies, as to whom the bill had been dismissed by the decree, were also liable for the full amount.

The Court of Appeals, without passing upon the merits of the controversy, reversed the decree. 68 F. (2d) 925. It did so, solely on the ground that, under the rule of *Booth* v. *Clark*, 17 How. 322, the "appointment of the plaintiff as ancillary receiver was void, and he did not acquire, in any of the proceedings, a status to warrant the institution of this suit." Its decision was based upon the following facts which were shown by the copy of the record of the proceedings in the federal court for southern New York by which McCandless was appointed ancillary receiver, and which he had introduced at the hearing in this cause. The papers in the proceeding for such appointment were entitled "Frank T. Harrington, Complainant against Duquesne Gas Corporation, Defendant;" but in fact, no independent bill against the Corporation had been filed in the Southern District of New York by Harrington, or by any other person. The papers filed consisted merely of a petition by McCandless as primary receiver praying that he be appointed ancillary receiver; and the order entered thereon. Annexed to his petition was a copy of the proceedings of the federal court for western Pennsylvania by which he was appointed primary receiver. The record does not show that the Corporation was represented when the appointment of the ancillary receiver was made. So far as disclosed by the record, the order of the District Court for Southern New York appointing him, was made *ex parte.*

The Court of Appeals held that the legal sufficiency of the appointment of the plaintiff as ancillary receiver had been put in issue by the answer; and that the plaintiff had not sustained the burden of establishing its legality. It ruled that in the federal courts a foreign receiver may not "sue outside the district as a matter of comity even by obtaining permission before suit is commenced;" that "to permit a foreign receiver to obtain an ancillary appointment, on an *ex parte* application, improperly avoids the rule denying foreign receivers the right to sue in the foreign

jurisdiction"; that the "right of a receiver to sue in a foreign court cannot be upheld as a mere incident to the office of a receiver"; and that, since federal courts for the several districts are foreign to one another, an ancillary receiver may be appointed only as an incident of an independent bill.

The importance of reviewing that ruling—in view of an established practice, said to prevail in perhaps a majority of the state courts, of permitting foreign receivers to sue,[1] and a common practice, said to obtain in federal courts, of appointing ancillary receivers on the *ex parte* application of the primary receiver—was the reason principally urged for granting the petition for certiorari. The order allowing certiorari was "limited to the questions pertaining to the validity of the appointment of the petitioner as ancillary receiver, and his right as such to maintain this suit." In the abbreviated record prepared for use here, only those portions of the original record which were supposed to bear upon those questions were included. The rest were omitted in printing pursuant to stipulation. The briefs filed on the argument of the case in this Court were directed solely to the question whether the appointment of the ancillary receiver as made was void and open to collateral attack. But statements of counsel made at the oral argument in this Court, in answer to enquiries, and confirmed by examination of the original record, enable us to dispose of the case without passing on the specific question whether in a federal court an ancillary receiver may be appointed otherwise than as an incident of an independent bill in equity.

First. The holding of the Court of Appeals that the legal sufficiency of the appointment of the plaintiff as ancillary receiver had been put in issue by the answer rests solely upon the provision in Equity Rule 30 which declares that a statement in the answer that the defendant is without knowledge as to facts alleged in the bill "shall be treated as a denial."[2] This constructive denial did

[1]It is stated by petitioner that a foreign equity receiver is permitted to sue in 21 States; and that the highest courts of 7 other States have indicated approval of that view.

[2]Paragraph Fourth of the amended bill of complainant after reciting the proceedings appointing McCandless primary receiver in the Western District of Pennsylvania, stated: "that upon petition of the complainant as such Receiver duly filed in the United States District Court in and for the Southern District of New York, an order was duly made on the 23rd day of March, 1932, by said last mentioned Court appointing said complainant, George W.

not suggest that there was a legal objection to the manner of the appointment or to its validity. The proceedings at the hearing and later show that there was no intention to deny the validity of the appointment of the ancillary receiver;[3] nor was it in fact questioned in the District Court.[4] On the appeal sixty-five alleged errors were assigned. One of them was directed to an alleged holding that the order entered in the Southern District of New York "constituted a due and valid appointment" of McCandless as ancillary receiver. But the record does not show that the District Court did so rule; or that it was requested to rule on the subject. Moreover, the petitioner stated that the objection to the validity of the appointment had been made for the first time in the Court of Appeals; and counsel for the respondent, in his oral argument in this Court, said that the objection to the

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McCandless, as Ancillary Receiver of Duquesne Gas Corporation, which last mentioned order duly authorized the complainant, as such Receiver, to bring this suit, and the complainant has duly qualified and is acting as such Ancillary Receiver." Defendant answered: "With respect to the allegation of paragraph 'Fourth' of the amended bill of complaint, defendant denies having information sufficient to form a belief with respect thereto and leaves the complainant to his proof thereof."

[3]McCandless, after testifying without objection to his appointment in Pennsylvania, was asked: "Thereafter did you apply for and obtain authority from the Court to bring this suit?" Defendants' counsel objected, stating: "The ground of my objection is that the order itself is the best evidence of what is contained therein. I might say at this point that I intend to raise the point in the course of this trial that the trustee had no authority to bring the suit in the particular action under which he was appointed." The court directed that the order be introduced. Thereupon, McCandless was asked: "Were you thereafter appointed ancillary receiver by this District Court?" Without objection, he answered "Yes". Then he was asked: "Were you there also authorized to bring suit?" Defendants' counsel then made "the same objection" which was sustained. The plaintiff then, without objection, introduced in evidence a copy of the proceeding appointing him the ancillary receiver. That record, including a copy of the proceedings in the Pennsylvania suit occupies 35 pages of the printed record in this Court.

The nature of the objection which counsel had in mind in asserting lack of authority in the "trustee" to bring the suit is not clear. It obviously related equally to the authority conferred by the Pennsylvania court on the primary receiver.

[4]The careful opinion of the District Judge (which occupies 14 pages of the printed record of this Court) makes no mention of any such objection or defense.

validity of the appointment was not urged by him because he desired to have a decision on the merits.

Second. Under the early practice an objection to the legal capacity of the plaintiff to sue could be taken only by plea in abatement. *Kane* v. *Paul,* 14 Pet. 33, 41; *Ventress* v. *Smith,* 10 Pet. 161, 168. Now, it may be taken by plea in bar or by answer. *Noonan* v. *Bradley,* 9 Wall. 394, 400-402. But an objection to the plaintiff's legal capacity to sue will not be entertained if taken, for the first time, in the appellate court. The rule is of general application and has been applied in the federal appellate courts to a variety of cases. To lack of capacity on the ground of infancy;[5] on the ground that plaintiff was a married woman;[6] on the ground that the husband was not entitled to sue in his own name for the death of his wife;[7] on the ground that plaintiff, a foreign corporation, had failed to comply with requirements of the local law;[8] on the ground that a suit in the name of the United States was brought without the requisite authority of the Attorney General.[9] Under like circumstances the appellate courts have refused to entertain the objection that plaintiff was not the real party in interest;[10] that the father was not entitled to sue for the death of his minor son;[11] and that the plaintiff, an executor or administrator, had not secured ancillary administration.[12] The reason for the rule is the broad one that a defect found lurking in the record on appeal may not be allowed to defeat recovery, where the defect might have been remedied, if the objection had been seasonably raised in the trial court.[13]

Third. The alleged invalidity of the order appointing McCandless ancillary receiver is a defect of this character. It is urged that the appointment of an ancillary receiver can be made only as

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[5]Paauhau Sugar Plantation Co. *v.* Palapala, 127 Fed. 920.

[6]Buckingham *v.* Estes, 128 Fed. 584, 585-6.

[7]St. Louis Southwestern Ry. Co. *v.* Henson, 58 Fed. 531.

[8]Dahl *v.* Montana Copper Co., 132 U. S. 264.

[9]McLaughlin *v.* United States, 107 U. S. 526, 528.

[10]Northwestern S. S. Co. *v.* Cochran, 191 Fed. 146, 149; Mayor, etc. *v.* United States, etc., 104 Fed. 113, 115.

[11]Texas & Pacific Ry. Co. *v.* Lacey, 185 Fed. 225, 227; App. Dis., 229 U. S. 628.

[12]Compare McAleer *v.* Clay County, 38 Fed. 707; Leahy *v.* Haworth, 141 Fed. 850.

[13]Compare O'Reilly *v.* Campbell, 116 U. S. 418, 420.

an incident of an independent bill, and upon application of one properly a party thereto; that here there was nothing before the court, because no suit was then pending in the Southern District of New York; that there was neither a plaintiff nor a defendant; that no relief was prayed; that no process had issued; that the Corporation did not voluntarily appear; and, hence, that the court lacked the power to make the appointment, since there was nothing before it upon which its judicial power could act. We have no occasion to decide whether the contention is well founded. For if the validity of his appointment as ancillary receiver had been seasonably urged in the trial court, the plaintiff might have remedied the defect by causing an independent bill to be filed; the District Court might thereon have entered an order appointing him ancillary receiver; and, in this cause, the trial court might have permitted the appropriate amendment of the bill of complaint.[14]

The rule that a federal appellate court must, of its own motion, dismiss the suit if it appears that the trial court was without jurisdiction, *Mansfield, etc., Ry. Co.* v. *Swan,* 111 U. S. 379, 382, is not applicable to the situation presented here. In the case at bar the District Court confessedly had jurisdiction of the subject matter and of the parties. The objection sustained goes not to the jurisdiction of the District Court in this suit, but to the legal capacity of the plaintiff as ancillary receiver.

Fourth. The objection which the Court of Appeals held fatal to the maintenance of this suit differs in essence from that sustained in *Booth* v. *Clark.* There, the foreign equity receiver suing in the federal court of another State failed because, having no title to the assets within the district, he was without a cause of action. He lacked title because the order appointing him did not, and could not, transfer to him the assets involved in the litigation. For that reason, a bill in the federal court for southern New York brought by the primary receiver, alleged to have been duly appointed in Pennsylvania and authorized to bring this suit, would have been bad on demurrer. But this bill by the ancillary receiver, which alleges that he had been duly appointed by the federal court for New York and authorized to bring the suit, would have been good on demurrer.

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[14]Compare Coal & Iron Ry. Co. *v.* Reherd, 204 Fed. 859.

Great Western Mining Co. v. *Harris,* 198 U. S. 561, 576, shows that the rule of *Booth* v. *Clark* rests upon practical considerations. The foreign receiver failed in the *Great Western* case although he sued in the name of the corporation. He failed, as the Court there stated, because "every jurisdiction, in which it is sought by means of a receiver to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to make such distribution of the funds realized within its own jurisdiction as will protect the rights of local parties interested therein, and not permit a foreign court to prejudice the rights of local creditors by removing assets from the local jurisdiction without an order of the court or its approval as to the officer who shall act in the holding and distribution of the property recovered." The nature of the rule of *Booth* v. *Clark* is shown further by the fact that, when by statute the appointment of the receiver operates to transfer title, the foreign receiver may sue in the federal court for another State. See *Bernheimer* v. *Converse,* 206 U. S. 516; compare *Converse* v. *Hamilton,* 224 U. S. 243; *Clark* v. *Williard,* 292 U. S. 112.

The judgment of the Court of Appeals is reversed and the cause is remanded to it for the determination of the questions relating to the liability of the defendants decided by the District Court and presented by the appeal and cross-appeal.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.